

1 DAVID A. ROSENFELD, Bar No. 058163
2 WEINBERG, ROGER & ROSENFELD
3 A Professional Corporation
4 1001 Marina Village Parkway, Suite 200
5 Alameda, California 94501
6 Telephone (510) 337-1001
7 Fax (510) 337-1023
8 E-Mail: drosenfeld@unioncounsel.net

9 Attorneys for Charging Party
10 The Committee to Preserve the Religious
11 Right to Organize

12 UNITED STATES OF AMERICA
13
14 NATIONAL LABOR RELATIONS BOARD
15
16 REGION 20

17 THE COMMITTEE TO PRESERVE THE
18 RELIGIOUS RIGHT TO ORGANIZE,
19
20 Charging Party.

21 And

22 HOBBY LOBBY STORES, INC.,
23
24 Respondent,

No. 20-CA-139745

25 **BRIEF IN SUPPORT OF**
26 **CHARGING PARTY'S CROSS-**
27 **EXCEPTIONS TO THE DECISION OF**
28 **THE ADMINISTRATIVE LAW JUDGE**
AND ANSWER BRIEF TO THE
EXCEPTIONS OF RESPONDENT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	STATEMENT OF THE CASE.....	1
III.	THE FUAP IS GOVERNED BY THE BOARD’S DECISION IN <i>MURPHY OIL</i>	2
IV.	THE FUAP IS UNLAWFUL BECAUSE IT CONTAINS OTHER UNLAWFUL PROVISIONS, OR THE EMPLOYER HANDBOOK CONTAINS UNLAWFUL PROVISIONS THAT AFFECT THE FUAP	3
A.	THE FUAP IS A COMPANY POLICY, AND THOSE POLICIES GOVERN THE FUAP; THOSE POLICIES, WHICH ARE UNLAWFUL, RENDER THE FUAP UNLAWFUL	3
B.	THE FUAP IS UNLAWFUL BECAUSE IT IS CONFIDENTIAL, AND WORKERS CANNOT DISCLOSE THE PROCEEDINGS	3
C.	THE SOLICITATION POLICY RENDERS THE FUAP UNLAWFUL	4
D.	THE LOITERING POLICY INTERFERES WITH THE FUAP	8
E.	THE EMAIL USAGE POLICY INTERFERES WITH THE FUAP	8
F.	THE COMPUTER USAGE POLICY INTERFERES WITH THE FAUP.....	8
G.	THE RETURN OF COMPANY PROPERTY POLICY INTERFERES WITH THE FUAP	9
H.	THE FUAP IS UNLAWFUL BECAUSE IT IS A COMPANY POLICY AND IS ENFORCEABLE BY WAY OF DISCIPLINE.....	9
I.	THE FUAP CONTAINS A PENALTY PROVISION FOR EXCERCISING SECTION 7 RIGHTS.....	9
J.	THE HANDBOOK CONTAINS A “FREE PEEK” PROVISION, WHICH GIVES AN UNFAIR ADVANTAGE TO THE EMPLOYER AND INTERFERES WITH THE SECTION 7 RIGHTS OF EMPLOYEES	10

1	K.	THE FUAP IS ONLY IN ENGLISH AND THUS DEPRIVES	
2		THE EMPLOYEES OF THEIR SECTION 7 RIGHTS TO	
3		READ, UNDERSTAND AND DISCUSS COLLECTIVELY	
4		THE FUAP AND THE APPLICABLE PROVISIONS IN THE	
5		HANDBOOK.....	10
6	L.	SUMMARY	11
7	V.	THE FAA DOES NOT APPLY SINCE THERE IS NO CONTRACT	
8		OF EMPLOYMENT	11
9	VI.	THE FAA DOES NOT APPLY TO THE TRUCKDRIVERS.....	13
10	VII.	THE BOARD MUST USE THIS CASE TO ADDRESS THE	
11		CONSTITUTIONAL ISSUE OF WHETHER THE FAA CAN BE	
12		APPLIED TO ACTIVITY WHICH DOES NOT AFFECT	
13		COMMERCE.....	14
14	A.	INTRODUCTION	14
15	B.	THIS CASE IS BEYOND THE STATUTORY REACH OF	
16		THE FAA SINCE THERE IS NO CONTRACT INVOLVING	
17		INTERSTATE COMMERCE	14
18	C.	THIS CASE IS BEYOND THE CONSTITUTIONAL REACH	
19		OF THE FAA SINCE THERE IS NO SHOWING THAT THE	
20		DISPUTES COVERED BY THE FUAP AFFECT	
21		INTERSTATE COMMERCE OR THAT THE ACTIVITY OF	
22		RESOLVING THOSE DISPUTES AFFECTS INTERSTATE	
23		COMMERCE.....	19
24	D.	THERE IS NO “CONTROVERSY” SUBJECT TO THE FAA	23
25	E.	HOBBY LOBBY’S ANALYSIS SHOULD BE REJECTED.....	23
26	F.	SUMMARY	24
27	VIII.	THE APPLICATION OF THE FEDERAL ARBITRATION ACT	
28		CANNOT OVERRIDE THE IMPORTANT PURPOSES OF OTHER	
		FEDERAL STATUTES THAT ALLOW EMPLOYEES TO SEEK	
		RELIEF FROM THE FEDERAL GOVERNMENT FOR THE	
		BENEFIT OF THEMSELVES AND OTHER WORKERS	24
	IX.	THE FUAP WOULD PROHIBIT COLLECTIVE ACTIONS THAT	
		ARE NOT PREEMPTED BY FAA UNDER STATE LAW	28

1	X.	THE FUAP UNLAWFULLY PROHIBITS GROUP CLAIMS THAT	
2		ARE NOT CLASS ACTIONS, REPRESENTATIVE ACTIONS,	
3		COLLECTIVE ACTIONS OR OTHER PROCEDURAL DEVICES	
		AVAILABLE IN COURT OR OTHER FORA	30
4	XI.	THE FUAP IS INVALID AND INTERFERES WITH SECTION 7	
5		RIGHTS TO RESOLVE DISPUTES BY CONCERTED ACTIVITY	
6		OF BOYCOTTS, BANNERS, STRIKES, WALKOUTS AND OTHER	
		ACTIVITIES.....	30
7	XII.	THE FUAP IS UNLAWFUL BECAUSE IT WOULD PROHIBIT	
		SALTING AND APPLIES AFTER EMPLOYMENT ENDS	32
8	XIII.	THE FUAP IS UNLAWFUL AND INTERFERES WITH SECTION 7	
9		RIGHTS BECAUSE IT FORECLOSES GROUP CLAIMS	
10		BROUGHT BY A UNION AS A REPRESENTATIVE OF AN	
		EMPLOYEE OR EMPLOYEES	32
11	XIV.	THE FUAP IS UNLAWFUL BECAUSE IT IMPOSES ADDITIONAL	
12		COSTS ON EMPLOYEES TO BRING EMPLOYMENT RELATED	
		DISPUTES	33
13	XV.	THE FUAP IS UNLAWFUL BECAUSE IT WOULD PROHIBIT AN	
14		EMPLOYEE OF ANOTHER EMPLOYER FROM ASSISTING A	
15		HOBBY LOBBY EMPLOYEE OR JOINING WITH A HOBBY	
		LOBBY EMPLOYEE TO BRING A CLAIM	33
16	XVI.	BECAUSE THE EMPLOYER ALLOWS GROUP CLAIMS TO BE	
17		BROUGHT, IT HAS NO VALID BUSINESS JUSTIFICATION TO	
		PRECLUDE THEM IN ARBITRATION	34
18	XVII.	THE FUAP IS UNLAWFUL AND INTERFERES WITH SECTION 7	
19		RIGHTS BECAUSE IT APPLIES TO PARTIES WHO ARE NOT	
20		THE EMPLOYER BUT MAY BE AGENTS OF THE EMPLOYER	
		OR EMPLOYERS OF OTHER EMPLOYEES UNDER THE ACT.....	35
21	XVIII.	THE FUAP IS UNLAWFUL AND INTERFERES WITH SECTION 7	
22		RIGHTS BECAUSE IT RESTRICTS THE RIGHT OF WORKERS	
23		TO ACT TOGETHER TO DEFEND CLAIMS BY THE EMPLOYER	
		AGAINST THEM.....	36
24	XIX.	THE FUAP IS UNLAWFUL UNDER THE NORRIS-LAGUARDIA	
25		ACT.....	36
26	XX.	THE FUAP IS INVALID BECAUSE IT IS UNCLEAR AS TO WHAT	
27		IT COVERS, AND THEREFORE IT IS OVERBROAD; THE	
		DECISION IN <i>LUTHERAN HERITAGE VILLAGE-LIVONIA</i>	
28		SHOULD BE OVERRULED; THE BOARD HAS NOW	

1	EFFECTIVELY OVERRULED <i>LUTHERAN HERITAGE VILLAGE-</i>	
2	<i>LIVONIA</i> AND SHOULD EXPRESSLY DO SO	37
3	A. INTRODUCTION	37
4	B. THE BOARD SHOULD DISCARD LUTHERAN HERITAGE	
5	VILLAGE-LIVONIA TO THE TRASH HEAP OF	
6	DISCREDITED DECISIONS	38
7	C. THE BOARD HAS EFFECTIVELY OVERRULED	
8	<i>LUTHERAN HERITAGE VILLAGE-LIVONIA</i> BY APPLYING	
9	THE RULE OF CONSTRUING AMBIGUITIES AGAINST	
10	THE EMPLOYER	42
11	D. CONCLUSION.....	43
12	XXI. THE ALJ IMPROPERLY APPROVED THE JOINT MOTION OF	
13	THE GENERAL COUNSEL AND THE RESPONDENT TO SUBMIT	
14	THIS MATTER ON A STIPULATED RECORD	43
15	XXII. THE RELIGIOUS FREEDOM RESTORATION ACT EXTENDS TO	
16	THE CORE RELIGIOUS ACTIVITY OF HELPING OTHER	
17	WORKERS, AND THE FAA, NLRA AND NORRIS-LAGUARDIA	
18	ACT HAVE TO BE APPLIED TO PROTECT THIS RELIGIOUS	
19	RIGHT	45
20	XXIII. THE REMEDY	54
21	XXIV. CONCLUSION.....	56

28

TABLE OF AUTHORITIES

Federal Cases

<i>Allied-Bruce Terminix Cos., Inc. v. Dobson</i> , 513 U.S. 265 (1995)	12, 15
<i>A&T v. Concepcion</i> , 563 U.S. 321 (2011)	53
<i>Bernhardt v. Polygraphic Co. of America</i> , 350 U.S. 198 (1956)	15, 16, 18
<i>Buckeye Check Cashing, Inc. v. Cardegna</i> , 546 U.S. 440 (2006)	12
<i>Burwell v. Hobby Lobby Stores, Inc.</i> , 134 S.Ct. 2751 (2014)	passim
<i>Circuit City Stores, Inc. v. Adams</i> , 532 U.S. 105 (2001)	12, 13, 23, 24
<i>Citizens Bank v. Alafabco, Inc.</i> , 539 U.S. 52 (2003)	17, 18, 23
<i>City of Boerne v. P. F. Flores</i> , 521 U.S. 507 (1997)	46, 51
<i>City of New York v. Beretta</i> , 524 F.3d 384 (2d Cir. 2008)	21
<i>Eastex v. NLRB</i> , 437 U.S. 556 (1978)	33
<i>EEOC v. Univ. of Detroit</i> , 904 F.2d 331 (6th Cir. 1990)	54
<i>Employment Division v. Smith</i> , 494 U.S. 872 (1990)	45
<i>First Options v. Kaplan</i> , 514 U.S. 938 (1995)	36
<i>Garrison v. Palmas Del Mar Homeowners Ass'n, Inc.</i> , 538 F. Supp. 2d 468 (D.P.R. 2008)	15
<i>Gonzales v. Raich</i> , 545 U.S. 1 (2005)	22
<i>Hobby Lobby Stores, Inc. v. Sebelius</i> , 723 F.3d 1114 (10th Cir.2013)	47, 48, 49, 50
<i>Hoffman Plastic Compounds v. NLRB</i> , 535 U.S. 137 (2002)	25, 43

1	<i>Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson,</i>	
2	102 F.R.D. 457 (N.D. Cal. 1983).....	33
3	<i>Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock,</i>	
4	477 U.S. 274 (1986).....	33
5	<i>Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell,</i>	
6	No. 13-1540, 2015 WL 4232096 (10th Cir. July 14, 2015).....	48
7	<i>Maryland v. Wirtz,</i>	
8	392 U.S. 183 (1968).....	21
9	<i>Medina Betancourt et al. v. Cruz Azul de,</i>	
10	P.R., 155 D.P.R. 735.....	15
11	<i>Nat'l Fed'n of Indep. Bus. v. Sebelius,</i>	
12	132 S.Ct. 2566 (2012).....	19, 20
13	<i>NLRB v. City Disposal Sys. Inc.,</i>	
14	465 U.S. 822 (1984).....	21
15	<i>NLRB v. Erie Resistor Corp.,</i>	
16	373 U.S. 221 (1963).....	35
17	<i>NLRB v. Great Dane Trailers,</i>	
18	388 U.S. 26 (1967).....	35
19	<i>NLRB v. Jones & Laughlin Steel Corp.,</i>	
20	301 U.S. 1 (1937).....	21
21	<i>Perry v. Thomas,</i>	
22	482 U.S. 483 (1987).....	19
23	<i>Republic Aviation v. NLRB,</i>	
24	324 U.S.793 (1945)	4
25	<i>Sakkab v. Luxottica Retail N. Am., Inc.,</i>	
26	803 F.3d 425 (9th Cir. 2015)	28
27	<i>Saneii v. Robards,</i>	
28	289 F.Supp.2d 855 (W.D. Ky. 2003).....	17
	<i>Shearson Hayden Stone, Inc. v. Liang,</i>	
	493 F. Supp. 104(N.D. Ill. 1980),	15
	<i>Slaughter v. Stewart Enterprises, Inc., No. C,</i>	
	07-01157MHP, 2007 WL 2255221 (N.D. Cal. Aug. 3, 2007)	15, 17, 18
	<i>Soc. Servs. Union, Local 535 v. Santa Clara Cty.,</i>	
	609 F.2d 944 (9th Cir. 1979)	33
	<i>Stampolis v. Provident Auto Leasing Co.,</i>	
	586 F.Supp.2d 88 (E.D.N.Y. 2008)	21

1	<i>United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.,</i>	
2	517 U.S. 544 (1996).....	33
3	<i>United States v. Circle C Constr.,</i>	
4	697 F.3d 345 (6th Cir. 2012)	26
5	<i>United States v. Lopez,</i>	
6	514 U.S. 549 (1995).....	21, 22
7	<i>United States v. Morrison,</i>	
8	529 U.S. 598 (2000).....	19, 20
9	<i>Veliz v. Cintas Corp.,</i>	
10	No. C 03-1180 SBA, 2004 WL 2452851(N.D. Cal. Apr. 5, 2004).....	13
11	<u>State Cases</u>	
12	<i>Bridas v. Int'l Standard Elec. Corp.,</i>	
13	490 N.Y.S.2d 711 (N.Y. Sup. Ct. 1985)	18
14	<i>Bruner v. Timberlane Manor Ltd. P'ship,</i>	
15	155 P.3d 16 (Okla. 2006)	17
16	<i>Carmona v. Lincoln Millennium Car Wash, Inc.,</i>	
17	226 Cal.App.4th 74 (2014)	4, 10, 11, 16
18	<i>City of Cut Bank v. Tom Patrick Constr., Inc.,</i>	
19	963 P.2d 1283 (Mont. 1998)	17
20	<i>Gemini Ambulance Servs., Inc.,</i>	
21	103 S.W.3d 507 (Tex. App. 2003).....	16
22	<i>Iskanian v. C.L.S. Transp.,</i>	
23	59 Cal.4th 348 (2014)	28, 29
24	<i>Rodriguez v. Testa,</i>	
25	296 Conn. 1, 993 A.2d 955 (2010)	21
26	<i>Sonic-Calabasas A, Inc. v. Moreno,</i>	
27	57 Cal.4th 1109 (2013),	28, 46
28	<u>NLRB Cases</u>	
	<i>Ark Las Vegas Rest. Corp.,</i>	
	343 NLRB 1281 (2004)	38
	<i>Browning-Ferris Indus.,</i>	
	362 NLRB No. 186 (2015)	35
	<i>Caesars Entertainment,</i>	
	362 NLRB No. 190 (2015)	37
	<i>Clara Barton Terrace Convalescent Ctr.,</i>	
	225 NLRB 1028 (1976)	34

1	<i>Conagra Foods, Inc.,</i>	
2	361 NLRB No. 113 (2014)	5
3	<i>Costco Wholesale,</i>	
4	358 NLRB No. 106	5
5	<i>D. R. Horton,</i>	
6	357 NLRB No. 184 (2012)	34
7	<i>Double D Construction Group, Inc.,</i>	
8	339 NLRB 303 (2003)	42
9	<i>Emergency One, Inc.,</i>	
10	306 NLRB 800 (1992)	5
11	<i>Flamingo Hilton Laughlin,</i>	
12	330 NLRB 287 (1999)	5
13	<i>Flex Frac Logistics,</i>	
14	358 NLRB No. 127 (2012)	5
15	<i>Fremont Med. Ctr.,</i>	
16	357 NLRB No. 158 (2011)	5
17	<i>Fresh & Easy Neighborhood Market,</i>	
18	361 NLRB No. 12 (2014)	8, 45
19	<i>In Wal-Mart Stores,</i>	
20	340 NLRB 637 (2003)	5
21	<i>ITT Indus.,</i>	
22	331 NLRB 4 (2000)	5
23	<i>Jensen Enter.,</i>	
24	339 NLRB 877 (2003)	5
25	<i>Koronis Parts,</i>	
26	324 NLRB 675 (1997)	5
27	<i>Lafayette Park Hotel,</i>	
28	326 NLRB 824 (1998)	37, 38, 41, 42
	<i>Lutheran Heritage Village-Livonia,</i>	
	343 NLRB 646 (2004)	38, 39
	<i>Mcpc, Inc.,</i>	
	360 NLRB No. 39 (2014)	5
	<i>Murphy Oil USA, Inc.,</i>	
	361 NLRB No. 72 (2014)	2, 37, 40
	<i>Norris/O'Bannon,</i>	
	307 NLRB 1236 (1992)	42

28

1	<i>Powellton Coal Co.,</i>	
2	354 NLRB 419 (2009)	5
3	<i>Professional Janitorial Serv.,</i>	
4	363 NLRB No. 35 (2015)	37, 42
5	<i>Purple Communications,</i>	
6	361 NLRB No. 126 (2014)	8
7	<i>Rockline Indus.,</i>	
8	341 NLRB 287 (2004)	5
9	<i>Scientific-Atlanta, Inc.,</i>	
10	278 NLRB 622 (1966)	5
11	<i>Starbucks Corp.,</i>	
12	354 NLRB 876 (2009)	5
13	<i>Three D, LLC d/b/a Triple Play Sports Bar & Grille,</i>	
14	361 NLRB No. 31 (2014)	40
15	<i>W. W. Grainger, Inc.,</i>	
16	229 NLRB 161 (1977)	5
17	<u>Federal Statutes</u>	
18	9 U.S.C. Section 1,.....	passim
19	29 U.S.C. § 11	52
20	29 U.S.C. § 101	36
21	29 U.S.C. § 102.....	36
22	29 U.S.C. § 103.....	37
23	29 U.S.C. § 151.....	21, 52
24	29 U.S.C. § 152(2)	45
25	29 U.S.C. § 159.....	54
26	29 U.S.C. section 160(e).....	1
27	29 U.S.C. § 175.....	33
28	29 U.S.C. § 201,.....	26
	29 U.S.C. § 217.....	26
	29 U.S.C. § 1001.....	26
	29 U.S.C. § 1132(a)(1) and (3)	26

28

1	29 U.S.C. § 1140.....	35
2	42 U.S.C. § 2000bb.....	passim
3	42 U.S.C. § 2000cc.	46
4	<u>State Statutes</u>	
5	Cal. Bus. & Prof. Code § 17204	29
6	Cal. Lab. Code § 210(b).....	28
7	Cal. Lab. Code § 217	28
8	Cal. Lab. Code § 218	28
9	Cal. Lab. Code § 225.5(b).....	28
10	Cal. Lab. Code § 245	29
11	Cal. Lab. Code § 1101 and 1102.....	29
12	Labor Code § 2699 and 2699.3.....	28
13		
14	<u>Other Authorities</u>	
15	<i>Arbitration's Counter-Narrative: The Religious Arbitration Paradigm,</i> 124 Yale L.J. 2994 (2015)	53
16	Professor Matthew Finkin, “The Meaning and Contemporary Vitality of the Norris-LaGuardia Act,” 93 Neb L. Rev 1 (2014)	37
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION

Hobby Lobby maintains an unlawful forced unilateral arbitration procedure (“FUAP”), which requires applicants and employees to waive Section 7 rights. First, the FUAP prevents employees from bringing charges to the National Labor Relations Board. Second, the FUAP prohibits collective, class representatives or other concerted action, including group actions, before any state, local or federal agency or state, local or federal court and in its FUAP. In these regards, the FUAP violates Section 8(a)(1) of the National Labor Relations Act. The ALJ has found these violations of the Act.

The ALJ ignored some fundamental issues. We discuss them below. We also address issues raised by Respondent. Hobby Lobby will challenge any Board ruling invalidating its FUAP. We urge the Board to adopt these alternative theories to ensure enforcement. We also do so to preserve the Charging Party’s rights to raise these issues on Review. 29 U.S.C. section 160(e).

Finally, we note that many of these issues have not been directly addressed by the Board. It would be easy for the Board to affirm, relying on the ALJ’s rationale. We hope that the Board will address these important issues.

II. STATEMENT OF THE CASE

Hobby Lobby maintains retail stores, distribution centers and other work places in virtually the entire Country. It is largely a retail operation with distribution centers and other employees.

As part of its employment policies, it maintains a FUAP. That FUAP is reflected in JX 2I and JX 2J and applies to all employees. Additionally, that FUAP applies to applicants. See JX 2K and JX 2L. An applicant cannot even apply unless the applicant agrees to waive their rights under the FUAP.

The same FUAP covers all employment disputes. Although exceptions are created for Workers’ Compensation and certain other state law claims, as well as an exemption for ERISA claims, there is no exemption for charges brought under the National Labor Relations Act.

1 Hobby Lobby not only maintains the FUAP, but it maintains many other employee
2 policies. See EX 2I and EX 2J. As we will point out, those employment policies, some of which
3 are illegal, govern the FUAP and make it illegal on that ground.

4 The Employer maintains two sets of employment policies. First, there is the employment
5 policy that governs in California. See EX 2I. Second, there is the employment policy that
6 governs throughout the rest of the Company. See EX 2J. Nonetheless, for purposes of the FUAP
7 and for the issues presented in this case, the differences appear to be of no significance.

8 Hobby Lobby also has truck drivers who drive in Interstate Commerce. This is relevant,
9 as we shall show, with respect to the application of federal law. See also
10 <http://www.drivehobbylobby.com/>.

11 Finally, as is more fully discussed below, Hobby Lobby claims to be an entity that adheres
12 to religious principles. It has already litigated and vindicated those religious principles in another
13 context. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014). In that case, the
14 Supreme Court expressly noted that religious principles govern the Hobby Lobby workplace.
15 Below, we address those issues when we consider the application of the Religious Freedom
16 Restoration Act (RFRA). See 42 U.S.C. § 2000bb–2000bb-4. As we shall show, concerted
17 activity to help others in the workplace is the core activity protected by the National Labor
18 Relations Act. Such activity is also a central principle of virtually every religious teaching,
19 including those that govern Hobby Lobby. The employer’s prohibition against employees
20 helping other employees to resolve workplace disputes violates this principle, and, to the extent
21 the application of the Federal Arbitration Act (FAA), 9 U.S.C. Section 1, *et seq.*, sanctions such a
22 policy, it substantially interferes with that religious activity.

23 **III. THE FUAP IS GOVERNED BY THE BOARD’S DECISION IN MURPHY OIL**

24 The Board’s decision in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), *enforcement*
25 *denied*, 2015 WL 6457613 (5th Cir. 2015), and subsequent cases governs. For reasons discussed
26 below, however, there are additional and related reasons why the FUAP is unlawful. We address
27 those issues below.

1 **IV. THE FUAP IS UNLAWFUL BECAUSE IT CONTAINS OTHER UNLAWFUL**
2 **PROVISIONS, OR THE EMPLOYER HANDBOOK CONTAINS UNLAWFUL**
3 **PROVISIONS THAT AFFECT THE FUAP**

3 **A. THE FUAP IS A COMPANY POLICY, AND THOSE POLICIES GOVERN THE**
4 **FUAP; THOSE POLICIES, WHICH ARE UNLAWFUL, RENDER THE FUAP**
5 **UNLAWFUL**

5 Here, we point out various policies maintained by Hobby Lobby that are applicable to the
6 FUAP. The ALJ did not address these issues, concluding that the Complaint did not allege these
7 policies to be unlawful. The Complaint alleged the FUAP to be unlawful. These challenged
8 policies were made part of the record and are part of the FUAP. The FUAP is in the same
9 handbook that contains these unlawful rules.¹ They render the FUAP unlawful.

10 **B. THE FUAP IS UNLAWFUL BECAUSE IT IS CONFIDENTIAL, AND WORKERS**
11 **CANNOT DISCLOSE THE PROCEEDINGS**

11 The FUAP is unlawful because the Employee Handbook contains an unlawful
12 confidentiality provision. That unlawful confidentiality provision is entitled “confidentiality
13 policy,” and it appears at JX 2I p. 31 and JX 2J p. 30. Because that policy would apply to
14 proceedings brought under the FUAP, the FUAP itself is unlawful. The confidentiality provision,
15 for example, encompasses “confidential data about employees, including employee pay rates and
16 performance evaluations.” It also extends to information “that if disclosed, could adversely affect
17 the Company’s business.” Claims or adverse decisions under the FUAP could adversely affect
18 the Company’s business.

19 It would prohibit employees from disclosing collective action under the FUAP or would
20 prohibit one employee who invoked the FUAP from disclosing what occurred in the FUAP. It
21 would prevent one employee from disclosing a favorable decision, which another employee could
22 use.²

23

¹ Hobby Lobby relies on handbook statements to explain and modify the FUAP. For example,
24 the Handbooks, Jt Ex. 2I at page 13 and 2J at page 13-14, refer to the FUAP and expressly
25 modify or clarify the FUAP. This applies to the rules discussed above. The handbooks are also
26 inconsistent with the FUAP. For example, the Handbooks refer to settling “legal disputes.”
27 The FUAP has no such limitation and includes “any demand, claim, controversy.” This is an
28 ambiguity that Hobby Lobby has not explained and should be construed against it.

² This confidentiality policy effectively forecloses the use of *res judicata* or collateral estoppel
principles by employees against Hobby Lobby. This is another substantive defect of the FUAP
that disallows substantive claims.

1 For the reasons addressed above, the confidentiality provision in the employee
2 handbooks³ and the American Arbitration Association rules renders the FUAP unlawful.

3 **C. THE SOLICITATION POLICY RENDERS THE FUAP UNLAWFUL**

4 The solicitation policy at JX 2I p. 32 and JX 2J p. 31 is unlawful. Employees may not
5 “solicit for any other cause during work time.” This would prohibit employees from soliciting
6 other employees to help them in any claim which they might bring under the FUAP. The policy
7 would furthermore prohibit employees from having documents in their possession to support their
8 claims. Finally, the policy prohibits employees from distributing “literature or printed material of
9 any kind in work areas at any time.” This would prevent them, for example, from soliciting
10 documents in support of claims or even copies of the Employee Handbook.

11 The word “solicitation” is overbroad. Under current Board law, a general
12 nondiscriminatory rule limiting employees’ communications that are solicitations to non-work
13 time is valid on its face and may be applied to email communications as to other communications.
14 This follows from the fact that “[w]orking time is for work,” so that “a rule prohibiting union
15 solicitation during working hours . . . must be presumed to be valid in the absence of evidence
16 that it was adopted for a discriminatory purpose.” *Republic Aviation v. NLRB*, 324 U.S.793, 803
17 n.10 (1945). By the same token, because

18 time outside working hours . . . is an employee’s time to use as he
19 wishes without unreasonable restraint, . . . a rule prohibiting union
20 solicitation by an employee outside of working hours, although on
21 company property[,] . . . must be presumed to be an unreasonable
impediment to self-organization . . . in the absence of evidence that
special circumstances make the rule necessary in order to maintain
production or discipline.

22 *Republic Aviation*, 324 U.S. at 803–04 n.10. Thus, to justify restrictions on employee email
23 communications concerning union or other concerted, protected matters during non-work time,
24 the employer must show “special circumstances” that “make the rule necessary.”

25
26
27 ³ See, e.g., *Carmona v. Lincoln Millennium Car Wash, Inc.*, 226 Cal.App.4th 74, 79, 89 (2014)
(confidentiality clause that is one sided renders arbitration agreement substantively
28 unconscionable).

1 On the other hand, it is well settled that rules prohibiting employees' discussion of their
2 wages, hours, or other terms and conditions of employment violate Section 8(a)(1) of the Act.
3 *Mcpc, Inc.*, 360 NLRB No. 39 (2014); *Flex Frac Logistics*, 358 NLRB No. 127 at * 1-2 (2012),
4 *enforced*, 746 F.3d 205 (5th Cir. 2014); *Costco Wholesale*, 358 NLRB No. 106 at p. 2-3;
5 *Flamingo Hilton Laughlin*, 330 NLRB 287, 292 (1999); *Koronis Parts*, 324 NLRB 675, 686, 694
6 (1997). See also *Scientific-Atlanta, Inc.*, 278 NLRB 622, 624-625 (1966) (wages are a “vital term
7 and condition of employment,” “probably the most critical element in employment” and “the grist
8 on which concerted activity feeds”).

9 It is, however, no longer possible to distinguish between solicitation and communication.
10 The Board has historically attempted to draw a distinction between solicitation and mere talking.
11 *Conagra Foods, Inc.*, 361 NLRB No. 113 (2014). See also *Fremont Med. Ctr.*, 357 NLRB No.
12 158 n. 9 (2011). In *W. W. Grainger, Inc.*, 229 NLRB 161, 166 (1977), *enforced*, 582 F.2d 1118
13 (7th Cir. 1978), the Board noted, “It should be clear that ‘solicitation’ for a union is not the same
14 thing as talking about a union or a union meeting or whether a union is good or bad.” See
15 *Powellton Coal Co.*, 354 NLRB 419 (2009), incorporated by reference in 355 NLRB 407 (2010)
16 (employer unlawfully prohibited employees from engaging in conversations about the union).
17 “An employer may not restrict union related conversations while permitting conversations
18 relating to other topics.” *Rockline Indus.*, 341 NLRB 287, 293 (2004); *Jensen Enter.*, 339 NLRB
19 877, 878 (2003). Thus, an employer cannot turn a valid no-solicitation rule into a no-talking rule.
20 *Starbucks Corp.*, 354 NLRB 876, 891-93 (2009); *Emergency One, Inc.*, 306 NLRB 800 (1992)
21 (respondent unlawfully restricted conversations about the union during work time while
22 permitting other conversations including those about non-work matters); *ITT Indus.*, 331 NLRB 4
23 (2000) (respondent's instruction not to engage in any discussion of the union with any employee
24 was unlawful where employees were, notwithstanding rule in employee handbook prohibiting all
25 solicitations during working time, allowed to engage in discussions and solicitation on the
26 production floor). In *Wal-Mart Stores*, 340 NLRB 637, 639 (2003), *enf'd in relevant part*, 400
27 F.3d 1093 (8th Cir. 2005), the Board found that the wearing of union insignia was not solicitation
28

1 and would not justify the application of a no solicitation rule. The Eighth Circuit found that the
2 employee solicited when he requested a signature on an authorization card, but did not engage in
3 solicitation when he: (1) entered a Walmart store while off-duty wearing a t-shirt that read “Union
4 Teamsters” on the front and “Sign a card... Ask me how!” on the back and (2) had conversations,
5 while on-duty, with Walmart Associates about attending a union meeting. *Wal-Mart Stores, Inc.*
6 *v. NLRB*, 400 F.3d 1093, 1097-1098 (8th Cir. 2005). The Board’s recent Decision in *Conagra*
7 *Foods, Inc.*, *supra*, illustrates, however, that this distinction is not viable.

8 For proof of our argument, we turn to the dictionary. The Supreme Court and lower
9 courts routinely turn to the dictionary as an authoritative source. Merriam-Webster’s definition of
10 “solicit” is in part as follows:

11 Full Definition of SOLICIT

12 *transitive verb*

13 1 a : to make petition to : entreat

14 b : to approach with a request or plea <*solicited* Congress
15 for funding>

16 2 : to urge (as one's cause) strongly

17 See <http://www.merriam-webster.com/dictionary/soliciting>.

18 The Oxford English Dictionary has the following definition of solicitation:

19 1 Ask for or try to obtain (something) from someone:

20 *‘he called a meeting to solicit their views’*

21 1.1 Ask (someone) for something:

22 *‘historians and critics are solicited for opinions by the
23 auction houses’*

24 See

25 [http://www.oxforddictionaries.com/us/definition/american_english/solicit?q=solicitation#solicit_](http://www.oxforddictionaries.com/us/definition/american_english/solicit?q=solicitation#solicit_10)
26 [_10](http://www.oxforddictionaries.com/us/definition/american_english/solicit?q=solicitation#solicit_10).

27 Neither of these definitions is limited to asking someone to pay money or sign something
28 contemporaneously. Asking for help or support is clearly a form of solicitation and clearly

1 protected. Asking other workers to walk out or to support some other action would be
2 solicitation.

3 Focusing on the definition “to urge (as one’s cause) strongly,” the term does not constitute
4 solicitation within the Board’s traditional definition of asking for money or asking someone to
5 sign an authorization card contemporaneously. Soliciting can, according to this definition (and
6 many dictionary definitions), constitute just communication. If many dictionaries define
7 solicitation in this broader fashion, any reasonable employee could read the dictionary and come
8 to the same conclusion.

9 *Conagra Foods, Inc., supra*, again confirms that solicitation “‘usually means asking
10 someone to join the union by signing his name to an authorization card’ at that time.” *Id.* at p. 2.
11 These cases, however, make it clear that the word “solicitation” is capable of many meanings,
12 some of which are contradictory. Indeed, the dispute in *Conagra Foods* demonstrates that there
13 remains no clear understanding of what constitutes “solicitation.” Management contends it has a
14 broader meaning. If the Board and courts are in disagreement, there is no reason to believe that a
15 “reasonable employee” would read it more narrowly or more broadly. Particularly if
16 management claims it has a broader meaning, no “reasonable” or any employee can figure out
17 what it means.

18 The problem here is that the no-solicitation rule doesn’t make this clear. If an employer’s
19 policy explained that solicitation was the immediate request for money or joining, the uncertainty
20 would be eliminated. Member Miscimarra’s dissent in *Conagra, supra*, proves our point. He
21 argues the Board’s decision creates uncertainty as to what is solicitation. If he is correct, then any
22 no-solicitation policy is void.

23 Since dictionaries define solicitation to include much broader conduct than falls within the
24 traditional labor law definition, the use of the word “solicitation” by itself, without further
25 limitation, is overbroad. The Board must directly face this issue.

26 Applying *Lutheran Heritage Village-Livonia*, employees will reasonably conclude, as the
27 Merriam-Webster and many dictionaries have, that solicitation encompasses activity that is

28

1 protected and permissible during work time. Hobby Lobby’s prohibition against “solicitation”
2 during work time encompasses communications that are not within the Board’s historical
3 definition of “solicitation.” If the Board and the Courts and employers cannot adequately identify
4 what is the difference between solicitation and communication, the word is overbroad. This
5 further illustrates why *Lutheran Heritage Village-Livonia* should be overruled. Alternatively, the
6 Board should find that the use of the word “solicitation” in Hobby Lobby’s prohibitory rule,
7 without more explanation, is overbroad and chills employee Section 7 rights. It thus interferes
8 with the FUAP because it limits the right of employees to seek support or “solicit” support and
9 assistance.

10 **D. THE LOITERING POLICY INTERFERES WITH THE FUAP**

11 The loitering policy at JX I p. 32 and JX J p. 31 would prohibit employees from remaining
12 in parking lots in order to solicit assistance to bring claims. This affects the ability of employees
13 to bring claims collectively or jointly under the FUAP.

14 **E. THE EMAIL USAGE POLICY INTERFERES WITH THE FUAP**

15 The email usage policy at JX I p. 36 and JX J p. 37 prohibits employees from sending
16 “unsolicited email messages.” This would prohibit employees from sending emails to other
17 employees about claims. They could not seek information or witnesses to support their claims.
18 This interferes with Section 7 rights of employees to resolve claims under the FUAP.

19 **F. THE COMPUTER USAGE POLICY INTERFERES WITH THE FAUP**

20 The computer usage policy at JX I p. 34–35 and JX J p. 35–36 interferes with the FUAP
21 because “email may not be used to solicit donations or support on behalf of individuals or
22 organizations.” This plainly violates *Purple Communications*, 361 NLRB No. 126 (2014). More
23 importantly, it interferes with the FUAP. Employees would be prohibited from soliciting support
24 for individual claims or any group claims brought under the FUAP. Cf. *Fresh & Easy*
25 *Neighborhood Market*, 361 NLRB No. 12 (2014) (solidarity principle allows employees to ask
26 another employee for support, i.e., solicit support).

27
28

1 **G. THE RETURN OF COMPANY PROPERTY POLICY INTERFERES WITH THE**
2 **FUAP**

3 The Company maintains a policy entitled “Return of Company Property Policy.” See JX I
4 p. 10–11, JX J p. 11.

5 Because this policy would require employees to return not only the handbook, but copies
6 of any documents, including evidence that might support their claims, this interferes with the
7 FUAP.

8 **H. THE FUAP IS UNLAWFUL BECAUSE IT IS A COMPANY POLICY AND IS**
9 **ENFORCEABLE BY WAY OF DISCIPLINE**

10 The stipulated facts indicate that the Employer has enforced the FUAP by way of motions
11 to compel arbitration. Examples of those motions are attached as JX 2Y and JX 2Z.

12 Additionally, the FUAP is contained within the Employee Handbook. It is thus a policy
13 maintained by the Respondent. The Respondent makes it plain that any conduct “inconsistent
14 with any of the Company’s policies . . . may be subject to discipline.” This is contained in the
15 Employee Conduct Policy. See JX 2I p. 29–30, JX 2J p. 28–29.

16 Because Hobby Lobby makes it clear that it will discipline employees for acts that violate
17 the Company’s policies, employees are subject to discipline if they file charges with the Labor
18 Board or file claims of any kind, including class or collective or concerted claims.

19 This principle underlies every case involving the maintenance of unlawful rules. The
20 Board assumes that employers will enforce company policies and rules by way of discipline.
21 Thus, the maintenance of those rules is unlawful because of the threat of discipline. No employer
22 maintains rules and announces to employees it will not enforce rules by way of discipline. Here,
23 Hobby Lobby makes it explicit that employees may be disciplined for violation of these rules.
24 There are many Board cases where employees have been disciplined for violation of such rules.

25 **I. THE FUAP CONTAINS A PENALTY PROVISION FOR EXERCISING**
26 **SECTION 7 RIGHTS**

27 The FUAP provides that if any party

28 institutes any action in a court of law or equity against the other
party with respect to any Dispute required to be arbitrated under
this Agreement, the responding party shall be entitled to recover

1 from the initiating party all costs, expenses and attorney fees
2 incurred to enforce this Agreement and compel arbitration, and all
3 other damages resulting from or incurred as a result of such court
4 action.

5 This penalizes workers who may institute any action in court. This penalizes employees
6 additionally because of the threat of a damage award. There is no provision in the FAA for such
7 an award of either fees or damages. This certainly chills if not terrorizes employees who may
8 want to exercise their Section 7 rights to bring a court action.⁵

9 **J. THE HANDBOOK CONTAINS A “FREE PEEK” PROVISION, WHICH GIVES
10 AN UNFAIR ADVANTAGE TO THE EMPLOYER AND INTERFERES WITH
11 THE SECTION 7 RIGHTS OF EMPLOYEES**

12 The handbook provides for an “Open Door Policy.” JX 2I p. 10, JX 2J p. 12. It
13 immediately precedes the FUAP. It states, “If any employee has any problem relating to his/her
14 job, the employee should promptly and frankly discuss it with his/her supervisor.” This gives
15 Hobby Lobby an unfair “free peek” at the employee claim or dispute. Such free looks are
16 considered substantively unconscionable.⁶ The FUAP also contains a “free peek” provision that
17 is mandatory: “Prior to submitting a dispute to arbitration, the aggrieved party shall first attempt
18 to resolve the Dispute by notifying the other party in writing of the Dispute.” These provisions
19 interfere with Section 7 rights, particularly for employees who want to refrain from presenting
20 their dispute to management until arbitration.

21 **K. THE FUAP IS ONLY IN ENGLISH AND THUS DEPRIVES THE EMPLOYEES
22 OF THEIR SECTION 7 RIGHTS TO READ, UNDERSTAND AND DISCUSS
23 COLLECTIVELY THE FUAP AND THE APPLICABLE PROVISIONS IN THE
24 HANDBOOK**

25 Employees have the fundamental right to discuss their terms and conditions of
26 employment. This necessarily includes understanding those terms. Hobby Lobby has presented
27 no evidence that it provides the FUAP or the handbook in any language other than English. More
28

25 ⁴ It is also substantively unconscionable because it does not allow an employee to recover fees if
26 Hobby Lobby files a petition to compel arbitration and is unsuccessful. *Carmona v. Lincoln
27 Millennium Car Wash, Inc., supra*.

27 ⁵ This is extremely broad since it encompasses “any Dispute.”

28 ⁶ *Carmona v. Lincoln Millennium Car Wash, Inc., supra* at 89.

1 than just interfering with Section 7 rights, it prevents Section 7 rights by keeping the FUAP secret
2 by having it and the Handbook in an incomprehensible format.⁷

3 **L. SUMMARY**

4 It is clear that there are a number of provisions in the employee handbook that undermine,
5 interfere with and severely restrict the right of employees to bring claims collectively or even
6 individually. The FUAP is effectively undermined and made unlawful by the Company's other
7 policies.⁸

8 **V. THE FAA DOES NOT APPLY SINCE THERE IS NO CONTRACT OF**
9 **EMPLOYMENT**

10 The FAA applies only where there is "a contract evidencing a transaction involving
11 commerce to settle by arbitration a controversy thereafter arising out of such contract." 9 U.S.C.
12 § 2. Under the FAA, there must be some other "contract involving commerce."

13 The Supreme Court's seminal decision applying the FAA is expressly conditioned upon
14 the existence of an employment contract:

15 Respondent, at the outset, contends that we need not address the
16 meaning of the § 1 exclusion provision to decide the case in his
17 favor. In his view, an employment contract is not a "contract
18 evidencing a transaction involving interstate commerce" at all,
19 since the word "transaction" in § 2 extends only to commercial
20 contracts. See *Craft*, 177 F.3d, at 1085 (concluding that § 2 covers
21 only "commercial deal[s] or merchant's sale [s]"). This line of
22 reasoning proves too much, for it would make the § 1 exclusion
23 provision superfluous. If all contracts of employment are beyond
24 the scope of the Act under the § 2 coverage provision, the separate
25 exemption for "contracts of employment of seamen, railroad
26 employees, or any other class of workers engaged in ... interstate
27 commerce" would be pointless. See, e.g., *Pennsylvania Dept. of*
28 *Public Welfare v. Davenport*, 495 U.S. 552, 562, 110 S.Ct. 2126,
109 L.Ed.2d 588 (1990) ("Our cases express a deep reluctance to
interpret a statutory provision so as to render superfluous other
provisions in the same enactment"). The proffered interpretation of
"evidencing a transaction involving commerce," furthermore,
would be inconsistent with *Gilmer v. Interstate/Johnson Lane*
Corp., 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991), where
we held that § 2 required the arbitration of an age discrimination
claim based on an agreement in a securities registration application,

26 ⁷ This renders it procedurally unconscionable. *Carmona v. Lincoln Millennium Car Wash, Inc.*,
27 *supra*, at 85.

28 ⁸ The FUAP would be substantively unconscionable under other state laws with these restrictions.

1 a dispute that did not arise from a “commercial deal or merchant's
2 sale.” Nor could respondent's construction of § 2 be reconciled with
3 the expansive reading of those words adopted in *Allied-Bruce*, 513
4 U.S., at 277, 279–280, 115 S.Ct. 834. If, then, *114 there is an
argument to be made that arbitration agreements in employment
contracts are not covered by the Act, it must be premised on the
language of the § 1 exclusion provision itself.

5 *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113-14(2001); See also *Buckeye Check Cashing,*
6 *Inc. v. Cardegna*, 546 U.S. 440, 445 (2006) (an arbitration provision is severable from the
7 remainder of the contract). See also *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265,
8 277 (1995) (finding “a contract evidencing a transaction involving commerce” as a prerequisite to
9 the application of the FAA).

10 There is no contract. The FUAP expressly states: “This Agreement is not, and should not
11 be construed to create a contract of employment, express from implied, and shall not alter
12 Employees at-will employment status.” The same language is contained in the introduction to the
13 Employee Handbook. See JX I p. 5 and JX J p. 5.

14 The ALJ avoided this issue, stating that it would be too complicated and no party had
15 briefed the issue. See ALJD p. 10. But the burden is on Hobby Lobby to establish the existence
16 of a contract. This is true under the NLRA and the FAA. Its handbook expressly disclaims such
17 a contract, and if their argument is that state law (or federal law) establishes the existence of such
18 a contract, the burden is on Hobby Lobby to establish such a contract. It has utterly failed to do
19 so. The fact that it has stores and locations in many states doesn’t excuse its task of establishing
20 the legitimacy of the FUAP in each state.

21 Assuming that the FUAP standing alone is a contract, that contract of employment does
22 not affect commerce. The FAA applies to “a contract evidencing a transaction involving
23 commerce to settle by arbitration a controversy thereafter arising out of such contract or
24 transaction.” There is no transaction here affecting commerce by the FUAP, assuming it is the
25 only contract. There is no evidence in the record of how such contract can affect commerce.

26 This issue is one of interpreting the statute. The FAA does not apply absent a contract.
27
28

1 **VI. THE FAA DOES NOT APPLY TO THE TRUCKDRIVERS**

2 The ALJ also found that the FAA does not apply to truck drivers. See ALJD p. 15-16.⁹
3 We agree with that conclusion. It is not necessary to reach the commerce clause issue as to those
4 employees who are statutorily excluded from the FAA. Hobby Lobby’s argument that the “bare
5 [sic] fact that drivers transport Hobby Lobby’s products across state lines” (Brief, p. 58) does not
6 establish the FAA exception is lame at best. What do truck drivers do except drive trucks across
7 state lines.¹⁰ Hobby Lobby furthermore ignores that the FUAP encompasses any group claim. Its
8 arguments that the Board cannot overrule the rules of court are equally irrelevant to the extent
9 that “group” including consolidated claims are foreclosed by the FUAP.

10
11
12
13
14
15
16
17 ⁹ Hobby Lobby employs truck drivers who transport goods in interstate commerce. See
 <http://www.drivehobbylobby.com/>. See Stipulation ¶4(b).

18 The Federal Arbitration Act exempts from its application drivers who are involved in interstate
19 commerce, meaning interstate transportation of goods. See 9 U.S.C. § 1; See also *Circuit City*
 Stores v. Adams, 532 U.S. 105 (2001) (discussing transportation exemption). One Court has
 extensively discussed this issue and stated:

20 Thus, reviewing the case law, this Court can see a general trend
21 amongst the circuits. Plaintiffs who are personally responsible for
22 transporting goods, no matter what industry they are in, are
23 “transportation workers” under the FAA exemption. Plaintiffs who
 oversee the transportation of goods in the transportation industry
 itself are also “transportation workers” under the FAA exemption.

24 *Veliz v. Cintas Corp.*, No. C 03-1180 SBA, 2004 WL 2452851, at *6 (N.D. Cal. Apr. 5, 2004)
 modified on reconsideration, No. 03-01180 (SBA), 2005 WL 1048699 (N.D. Cal. May 4, 2005).

25 Hobby Lobby is not involved in the transportation industry as a motor private carrier, and the
 truck drivers are within the exclusion.

26 Even to the extent the FAA may foreclose the National Labor Relations Act from protecting
27 Section 7 rights for other employees, it cannot do so for the truck drivers. The ALJ must address
 that issue in this case.

28 ¹⁰ A truck driver is involved in commerce even if she does not drive across state lines.

1 **VII. THE BOARD MUST USE THIS CASE TO ADDRESS THE CONSTITUTIONAL**
2 **ISSUE OF WHETHER THE FAA CAN BE APPLIED TO ACTIVITY WHICH**
3 **DOES NOT AFFECT COMMERCE**

4 **A. INTRODUCTION**

5 The Board has never addressed the question of whether the FAA may be applied to a
6 FUAP without constitutional concerns under the Commerce Clause.¹¹ We address those issues
7 below.

8 The ALJ concluded that the FAA cannot be applied unless the employment dispute that
9 would be subject to the FUAP affects commerce. Although we agree on that point, Charging
10 Party asserts that there are alternative applications of commerce clause jurisprudence that make it
11 unconstitutional to apply the FAA to the FUAP.

12 First, assuming there were an individual contract, there is no showing that such a contract
13 that includes the FUAP, affects commerce. Second, we agree that the employment dispute itself
14 is an activity, and the employer must show that activity affects commerce. Third, the employer
15 must show that the dispute resolution activity of individual arbitration or group arbitration affects
16 commerce. Fourth, there is no “transaction” triggering the FAA. Here, the employer failed to
17 establish any constitutional basis to apply the FAA.

18 There is no inconsistency in the regulation of activity encompassed within the National
19 Labor Relations Act and finding no commerce activity regulated by the FAA. The Act regulates
20 the employer; the activity regulated is activity of employees and employers and labor
21 organizations. In contrast, the FAA regulates only a target activity: arbitration. It does not
22 purport to apply to employees, unions or employers. Thus, there is no inconsistency.

23 **B. THIS CASE IS BEYOND THE STATUTORY REACH OF THE FAA SINCE**
24 **THERE IS NO CONTRACT INVOLVING INTERSTATE COMMERCE**

25 By its own terms, the FAA applies only to arbitration provisions that appear in a “contract
26 evidencing a transaction involving commerce” (9 U.S.C. § 2), where commerce is defined as

27 ¹¹ Counsel for the Charging Party has raised this issue in several other cases pending before the
28 Board. The issue is more thoroughly briefed in this case. The ALJ has in part addressed this
29 issue. The Board cannot duck it because it cannot reach the merits without deciding whether
30 the FAA applies either as an interpretation of the statute or as a matter of commerce clause
31 regulation.

1 “commerce among the several States or with foreign nations.” 9 U.S.C. § 1. The Supreme Court
2 has held that under this language, “the transaction (that the contract evidences) must turn out, *in*
3 *fact*, to have involved interstate commerce.” *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513
4 U.S. 265, 277 (1995) (emphasis in original).¹²

5 Thus, the FAA cannot be applied unless there is proof that the contract containing the
6 arbitration provision involved a transaction that in fact affects interstate commerce. *Garrison v.*
7 *Palmas Del Mar Homeowners Ass’n, Inc.*, 538 F. Supp. 2d 468, 473 (D.P.R. 2008) (“[T]he FAA .
8 . . only applies when the parties allege and prove that the transaction at issue involved interstate
9 commerce”) (citing *Medina Betancourt et al. v. Cruz Azul de P.R.*, 155 D.P.R. 735, 742–43
10 (2001)); *Shearson Hayden Stone, Inc. v. Liang*, 493 F. Supp. 104, 106 (N.D. Ill. 1980), *aff’d.*, 653
11 F.2d 310 (7th Cir. 1981) (“Interstate commerce is a necessary basis for application of the
12 [FAA]”).

13 In *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956), the Supreme Court
14 found that the FAA did not apply did not apply to an employment contract between Polygraphic
15 Co., an employer engaged in interstate commerce, and Norman Bernhardt, the superintendent of
16 the company’s lithograph plant in Vermont. The Court found that the contract did not “evidence
17 a transaction involving commerce within the meaning of section 2 of the Act” because there was
18 “no showing that petitioner while performing his duties under the employment contract was
19 working ‘in’ commerce, was producing goods for commerce, or was engaging in activity that
20 affected commerce.” *Bernhardt*, 350 U.S. at 200-01.

21 Similarly, in *Slaughter v. Stewart Enterprises, Inc.*, No. C 07-01157MHP, 2007 WL
22 2255221 (N.D. Cal. Aug. 3, 2007), the court found that an “employment contract [did] not
23 involve interstate commerce as required by the [FAA]” where an employee “was employed at a
24 single location,” “his employment did not require interstate travel,” and “his activities while
25 employed with defendants as well as the events at issue in the underlying suit were confined to
26

27 ¹² The Court in *Allied-Bruce* also clarified that “the word ‘involving’ is . . . the functional
28 equivalent of the word ‘affecting.’” 513 U.S. at 273–74.

1 California.” See also *Gemini Ambulance Servs., Inc.*, 103 S.W.3d 507 (Tex. App. 2003) (holding
2 FAA not applicable where services performed were confined to Texas).

3 There is no evidence that the transaction between the parties here involves interstate
4 commerce. Employees who perform work in only one state are not engaged in activity that
5 affects interstate commerce.¹³ Disputes that arise between these employees and Hobby Lobby
6 may be simple, local disputes governed only by state law, like one missed meal period or rest
7 break. Some disputes might not even be economic, but just claims seeking to resolve personality
8 issues or shift assignments or workplace duties. Whether this kind of local dispute is submitted to
9 individual or group arbitration in its final stages will not make any difference for interstate
10 commerce.¹⁴ Yet the FUAP purports to govern all this activity, no matter how trivial or local.
11 Such a private arbitration agreement with an individual who does not perform work across state
12 lines, does not transport goods across state lines, and is not seeking to enforce anything other than
13 state law is not a contract evidencing a transaction involving interstate commerce.

14 The interstate character of Hobby Lobby’s retail business does not alter this conclusion.
15 The relevant question here is whether the transaction *between the parties* has an effect on
16 interstate commerce. The fact that one of the parties to the transaction is *independently* involved
17 in interstate commerce does not bring every contract that party enters, no matter how trivial or
18 local, within the reach of the FAA. Even though Polygraphic Co. was an employer that engaged
19 in interstate commerce and operated lithograph plants in multiple states, the Supreme Court still
20 determined that the arbitration agreement in the employment contract between Polygraphic Co.
21 and Bernhardt did not involve interstate commerce. *Bernhardt*, 350 U.S. at 200-01. Even though
22 Hobby Lobby is engaged in a retail business that impacts interstate commerce, an arbitration
23 agreement between Hobby Lobby and an individual employee who does not perform work across
24 state lines is still an agreement about how to resolve generally local disputes that does not involve
25

26 ¹³ The only employees who have been identified as performing work across state lines are
transportation workers, exempt from the FAA on other grounds.

27 ¹⁴ For an example of a dispute where no party asserted the FAA applied, see *Carmona v. Lincoln*
28 *Millennium Car Wash, Inc.*, *supra*.

1 interstate commerce. As the court observed in *Slaughter*, “[t]he existence of national companies .
2 . . . does not undermine the conclusion that the activity is confined to local markets. Techniques of
3 modern finance may result in conglomerations of businesses. . . . [but] the reaches of the
4 Commerce Clause are not defined by the accidents of ownership.” *Slaughter v. Stewart Enters.,*
5 *Inc.*, No. C 07-01157MHP, 2007 WL 2255221, at *7 (N.D. Cal. Aug. 3, 2007).

6 Similarly, the purchase and transportation of certain inputs from out-of-state does not
7 transform the local nature of the agreement to arbitrate, since those purchases are not part of the
8 arbitration agreement but are merely incidental to the transaction. See *Bruner v. Timberlane*
9 *Manor Ltd. P’ship*, 155 P.3d 16, 31 (Okla. 2006) (“The facts that the nursing home buys supplies
10 from out-of-state vendors . . . are insufficient to impress interstate commerce regulation upon the
11 admission contract for residential care between the Oklahoma nursing home and the Oklahoma
12 resident patient.”); *Saneii v. Robards*, 289 F.Supp.2d 855, 860 (W.D. Ky. 2003) (The sale of
13 residential real estate to an out-of-state purchaser had “no substantial or direct connection to
14 interstate commerce,” since any movements across state lines were “not part of the transaction
15 itself” but merely “incidental to the real estate transaction”); *City of Cut Bank v. Tom Patrick*
16 *Constr., Inc.*, 963 P.2d 1283, 1287 (Mont. 1998) (The purchase of insurance and materials from
17 out of state did not impact court’s decision that construction contract was a local transaction, not
18 involving interstate commerce).

19 *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003), does not change the analysis. In that
20 case, the Supreme Court held that the FAA could be applied in cases where there was no showing
21 that the individual transaction had a specific effect upon interstate commerce, so long as “in the
22 aggregate the economic activity in question would represent a general practice subject to federal
23 control” and “that general practice bear[s] on interstate commerce in a substantial way.”
24 *Alafabco*, 539 U.S. at 56–57 (internal citations omitted). Under this standard, the Court found
25 that the application of the FAA to certain debt-restructuring contracts was justified given the
26 “broad impact of commercial lending on the national economy” and the facts that the restructured
27 debt was secured by inventory assembled from out-of-state parts and that it was used to engage in
28

1 interstate business. *Alafabco*, 539 U.S. at 57–58.¹⁵ As the ALJ and other courts have observed,
2 the logic used by the *Alafabco* court to justify the application of the FAA to a large financial
3 transaction between a bank and a multistate manufacturer is not readily applicable to a private
4 arbitration agreement covering claims that a local employment contract has been breached.
5 *Slaughter v. Stewart Enters., Inc.*, No. C 07-01157MHP, 2007 WL 2255221, at *4 (N.D. Cal.
6 Aug. 3, 2007) (distinguishing the “debt-restructuring contracts involving a manufacturer” at issue
7 in *Alafabco* from a contract “for service type employment that occurred solely within the state”);
8 see also *Bridas v. Int’l Standard Elec. Corp.*, 490 N.Y.S.2d 711, 717 n.3 (N.Y. Sup. Ct. 1985)
9 (contrasting “an agreement based upon a multimillion dollar transfer of stock between an
10 American and Argentine corporation” and the simple allegation of breach of an employment
11 contract at issue in *Bernhardt*). Private arbitration agreements with employees who do not
12 perform work across state lines, do not transport goods across state lines, and are not seeking to
13 enforce anything other than state law are not contracts that involve interstate commerce in the
14 way major debt-restructuring contracts did.

15 The FAA cannot be stretched so far as to apply to any arbitration agreement between an
16 individual and their employer just because the employer is, for other purposes, engaged in
17 interstate commerce. Such a reading of the FAA would contravene the Supreme Court’s decision
18 in *Bernhardt*¹⁶ and raise serious constitutional concerns.

19
20
21
22
23 ¹⁵ Notably, private arbitration agreements on their own were not held to constitute a “general
24 practice” that “bear[s] on interstate commerce in a substantial way.” Instead, the Court relied
25 on other characteristics of the transaction at issue to find the required connection to interstate
commerce.

26 ¹⁶ In *Bernhardt*, the Court explained that the FAA should be construed narrowly, so as not apply
27 to an arbitration agreement between a multistate lithograph company and an employee who did
28 not work across state lines. The Court warned that allowing the FAA to reach such
transactions that did not affect interstate commerce would impermissibly “invade the local law
field.” *Bernhardt*, 350 U.S. at 202.

1 **C. THIS CASE IS BEYOND THE CONSTITUTIONAL REACH OF THE FAA SINCE**
2 **THERE IS NO SHOWING THAT THE DISPUTES COVERED BY THE FUAP**
3 **AFFECT INTERSTATE COMMERCE OR THAT THE ACTIVITY OF**
4 **RESOLVING THOSE DISPUTES AFFECTS INTERSTATE COMMERCE**

5 Under the Commerce Clause, Congress may only regulate “‘the channels of interstate
6 commerce,’ ‘persons or things in interstate commerce,’ and ‘those activities that substantially
7 affect interstate commerce.’” *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2578 (2012)
8 (quoting *United States v. Morrison*, 529 U.S. 598, 609 (2000)). Because the FAA was enacted
9 pursuant to the Commerce Clause (*Perry v. Thomas*, 482 U.S. 483, 490 (1987)), it cannot
10 constitutionally be applied here unless the regulated activity has this connection to interstate
11 commerce.

12 The fact that the employer in this case is independently engaged in interstate commerce
13 cannot supply the necessary connection to commerce, because the FAA is not a regulation of the
14 employer or the employer’s retail business. In *Sebelius*, the Supreme Court made it clear that
15 Congress may only use its authority under the Commerce Clause “to regulate classes of
16 activities,” “not classes of *individuals*, apart from any activity in which they are engaged.”
17 *Sebelius*, 132 S.Ct. at 2591 (emphasis in original). Thus, in determining whether a regulation is
18 permissible under the Commerce Clause, the court must not look at the class of individuals
19 affected by the law, but at the actual activities that are being targeted by the law. Following this
20 analysis, the Court ruled that the individual mandate could not be characterized as a regulation of
21 individuals who would eventually consume healthcare, because that is just a class of individuals
22 and not the actual activity regulated by the ACA. *Id.* at 2590-91. Similarly here, the FAA cannot
23 be characterized as a regulation of employers engaged in interstate commerce, because that is just
24 a class of corporate individuals and not the actual activity regulated by the FAA.

25 The actual activity regulated by the FAA is the resolution of disputes between private
26 individuals. The FAA does not seek to regulate how the employer conducts its business or carries
27 out its commercial activities. The FAA does not purport to regulate any activity other than the
28 narrow aspect of dispute resolution in arbitration. This is the actual activity Congress sought to
regulate in the FAA, and such a law passed pursuant to the Commerce Clause cannot be

1 constitutionally applied to the dispute resolution activity here unless this activity is connected to
2 interstate commerce. See *Sebelius*, 132 S.Ct. at 2578.

3 The activity of resolving disputes between private individuals is not a “channel of
4 interstate commerce,” it is not a person or thing “in” interstate commerce, and whether the
5 disputes covered by the FUAP here are resolved in individual or group arbitration does not
6 “substantially affect interstate commerce.” *Sebelius*, 132 S.Ct. at 2578 (quoting *Morrison*, 529
7 U.S. at 609). Many of the disputes covered by the FUAP do not implicate interstate commerce or
8 have any substantial effect on interstate commerce. The FUAP is drafted in a way that would
9 extend to any employment dispute. It could encompass a claim for one hour’s pay, one missed
10 meal period or rest break, or any other claim that has no impact whatsoever on interstate
11 commerce. It would encompass a claim that was not economic at all, but just an effort to resolve
12 personality issues or shift assignments or workplace duties. See JX 2I p. 12-13 and JX 2J p. 13.
13 If two employees had a “conflict” that was not economic and asked for joint collective arbitration,
14 that dispute would not have any impact on interstate commerce. All non-economic disputes that
15 would have no impact on commerce are covered.¹⁷ Such local disputes governed by state
16 contract law or state labor law lack any substantial connection to interstate commerce. If the
17 dispute does not affect interstate commerce, regulation of the resolution of the dispute is not
18 within the scope of the Commerce Clause, and the FAA cannot constitutionally apply.¹⁸ Whether
19 a dispute between Hobby Lobby and its employees is ultimately resolved in individual or group
20 arbitration does not have an impact on any issue of interstate commerce. Because the employer
21 has not shown that the disputes covered by the FUAP would affect interstate commerce or that
22 the activity of resolving those disputes in individual or group arbitration would affect interstate
23 commerce, the FAA cannot constitutionally be applied here.

24 ¹⁷ The Christian Colation methods of resolution encourage mediation of disputes, and this would
25 include resolution of non-economic disputes among employees or between employees and the
26 employer and its bosses. These kinds of disputes would have no impact on commerce.

26 ¹⁸ Concededly, some of the disputes that may arise could affect commerce. But the FUAP is
27 drafted in a way that would cover every dispute that could potentially arise. Hobby Lobby
28 cannot maintain the burden of its defense that every claim would affect commerce so as to
trigger the FAA.

1 Even though the FAA cannot constitutionally target the dispute resolution activity here,¹⁹
2 the NLRA can constitutionally regulate dispute resolution activity between employers and their
3 employees. This is not anomalous. The NLRA was passed pursuant to explicit Congressional
4 findings that “[t]he inequality of bargaining power between employees who do not possess full
5 freedom of association or actual liberty of contract and employers who are organized in the
6 corporate or other forms of ownership association substantially burdens and affects the flow of
7 commerce.” 29 U.S.C. § 151. The Supreme Court has explained that Section 7 of the NLRA
8 embodies the effort of Congress to remedy this problem. *NLRB v. City Disposal Sys. Inc.*, 465
9 U.S. 822, 835 (1984) (“[I]t is evident that, in enacting §7 of the NLRA, Congress sought
10 generally to equalize the bargaining power of the employee with that of his employer by allowing
11 employees to band together in confronting an employer regarding the terms and conditions of
12 their employment.”). The NLRA can thus reach dispute resolution as a necessary part of its
13 regulation of the employment relationship, designed to address the inequality in bargaining power
14 that burdens interstate commerce. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37
15 (1937) (recognizing that regulation of local, intrastate activity is permissible as a necessary part of
16 a larger regulatory scheme). Unlike the NLRA, the FAA is not a larger regulation of employment
17 and does not seek to change the fundamental ways employers and workers relate to each other in
18 order to confront the labor strife that impedes interstate commerce. It seeks to regulate the private
19 dispute resolution activity of individuals apart from its content or context and this is
20 impermissible.

21 Congress may not focus on the intrastate dispute resolution activities of private
22 individuals apart from a larger regulation of economic activity. See *United States v. Lopez*, 514
23 U.S. 549, 558 (1995) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968)) (The Court has
24 never declared that “Congress may use a relatively trivial impact on commerce as an excuse for

25
26 ¹⁹ The courts in *Stampolis v. Provident Auto Leasing Co.*, 586 F.Supp.2d 88 (E.D.N.Y. 2008),
27 and *City of New York v. Beretta*, 524 F.3d 384 (2d Cir. 2008), recognized that litigation is
28 different from the activity of the entity involved in the litigation. See also *Rodriguez v. Testa*,
296 Conn. 1, 26, 993 A.2d 955, 969 (2010) (finding statute constitutional under Commerce
Clause because it regulates industry, not litigation).

1 broad general regulation of state or private activities.’ Rather, ‘the Court has said only that *where*
2 *a general regulatory statute bears a substantial relation to commerce*, the de minimis character of
3 individual instances arising under that statute is of no consequence.’” (emphasis in original)).
4 The Supreme Court has said that regulation of intrastate activity is permissible where it is one of
5 the “essential parts of a larger regulation of economic activity” and the “regulatory scheme could
6 be undercut unless the intrastate activity were regulated.” *Lopez*, 514 U.S. at 561. The relevant
7 statutory regime here is the FAA. By its terms, the FAA addresses only individual transactions.
8 9 U.S.C. § 2 (applying the terms of the act to “a written provision in any maritime transaction or
9 contract evidencing a transaction involving commerce”). Therefore, the regulatory scheme does
10 not encompass wide sectors of economic activity in a general fashion but rather applies to
11 individual transactions or contracts. Regulation of a local dispute that does not itself have any
12 effect on interstate commerce is not a necessary part of the regulatory scheme. Similarly, failure
13 to enforce arbitration provisions in purely intrastate contracts would not subvert the entire
14 statutory scheme in the same way as the failure to regulate purely intrastate marijuana production
15 would undercut regulation of interstate marijuana trafficking. *Gonzales v. Raich*, 545 U.S. 1, 26
16 (2005). Because regulation of the intrastate activity here is “not an essential part of a larger
17 regulation of economic activity, in which the regulatory scheme could be undercut unless the
18 intrastate activity were regulated,” it “cannot . . . be sustained under our cases upholding
19 regulations of activities that arise out of or are connected with a commercial transaction, which
20 viewed in the aggregate, substantially affects interstate commerce.” *Lopez*, 514 U.S. at 561. As a
21 result, there are no constitutional grounds for applying the FAA to intrastate dispute resolution
22 activity that bears only a trivial effect on interstate commerce.

23 Because the application of the FAA depends on the Commerce Clause, and because the
24 forum in which this employment dispute is resolved does not have a substantial effect on
25 interstate commerce, the FAA cannot be used to prohibit or interfere with protected concerted
26 activity under the NLRA.

27
28

1 **D. THERE IS NO “CONTROVERSY” SUBJECT TO THE FAA**

2 The FAA applies to “a contract evidencing a transaction involving commerce to settle by
3 arbitration a controversy thereafter arising out of such contract or transaction.” There is no
4 controversy here. No employee has asserted any claim. No employee has asserted any claim
5 because the FUAP is not an effective means of resolving individual claims. Group or class claims
6 are prohibited. The FAA is only triggered by its terms when there is a “controversy.” None
7 exists here except whether the provision violates the Act. That controversy, as to whether the
8 FUAP violates the Act, is excluded from the reach of the FUAP. See ALJD p. 17: 9-18-42.
9 Additionally, Hobby Lobby in its Exceptions asserts that this controversy is not subject to the
10 FUAP. Thus, until a concrete controversy develops, the FAA cannot be applied.²⁰

11 **E. HOBBY LOBBY’S ANALYSIS SHOULD BE REJECTED**

12 Hobby Lobby relies largely on *Alafabco, supra*. We have discussed it above. When the
13 Supreme Court addressed the Commerce Clause question in *Alafabco*, it notably did not find that
14 private arbitration agreements on their own were a “general practice” that “bear[s] on interstate
15 commerce in a substantial way.” The Court instead relied on other characteristics of the
16 transaction at issue—a multimillion dollar debt restructuring contract between a bank and a
17 multistate manufacturer—to find the necessary connection to interstate commerce. Here, there is
18 no evidence that individual or group “disputes” affect commerce. Hobby Lobby’s argument is
19 that as long as its nationwide retail business affects commerce, any employment dispute must also
20 affect commerce.²¹ That statement of Hobby Lobby’s position demonstrates that it is not logical.

21
22 ²⁰ The record reflects two discrete controversies. See Exhibits Y and Z to the Joint Stipulation.
23 Hobby Lobby has not asserted these disputes affect commerce. Even if they did, this would
24 not affect this argument except as to those two discrete controversies. There can be no
25 controversy with the Charging Party, who is not subject to the FUAP and who is not an
26 employee. We use the pronoun “who” since the Committee is a person.

27 ²¹ Thus its aggregation argument based on *Circuit City Stores v. Adams*, 532 U.S. 105 (2001), and
28 *E.E.O.C. v. Waffle House*, 534 U.S. 279 (2002), is inapposite. Neither of these cases involved
29 challenges based on the reach of the commerce power, and so the Supreme Court did not
30 address the statutory question of whether the arbitration agreements in these cases were part of
31 contracts evidencing transactions involving commerce or the constitutional question of
32 whether the FAA could constitutionally be applied in such situations.

1 Hobby Lobby also argues the issue was resolved in *Circuit Cty Stores v Adams*, 194 F. 3d
2 070, 1072 (9th Cir. 1999), *reversed*, 532 U.S. 1070 (2001). It hardly serves as precedent when
3 the Ninth Circuit's decision was that the alleged employment agreement was not governed by the
4 FAA. Hobby Lobby points to no case that has squarely held that an employment arrangement
5 that disclaims that it is an employment agreement is an agreement for FAA purposes.

6 **F. SUMMARY**

7 In summary, the National Labor Relations Act may regulate the business of this employer
8 because of the impact on commerce. No one disputes that. The Federal Arbitration Act,
9 however, regulates the specific activity of dispute resolution in the form of arbitration, and that
10 activity does not affect commerce within the Commerce Clause. Alternatively, the FAA regulates
11 only employment disputes that affect commerce. Further, there is no contract subject to the FAA
12 nor is there any controversy subject to the FAA.

13 The Board must address this constitutional issue. It cannot do so by applying the doctrine
14 of constitutional avoidance. Here, Hobby Lobby relies for its core argument on the FAA. Either
15 it applies or it doesn't. The Board cannot duck and weave and avoid.²²

16 **VIII. THE APPLICATION OF THE FEDERAL ARBITRATION ACT CANNOT** 17 **OVERRIDE THE IMPORTANT PURPOSES OF OTHER FEDERAL STATUTES** 18 **THAT ALLOW EMPLOYEES TO SEEK RELIEF FROM THE FEDERAL** 19 **GOVERNMENT FOR THE BENEFIT OF THEMSELVES AND OTHER** 20 **WORKERS**

21 The Board must address directly the question of whether the Federal Arbitration Act may
22 trump the application of the National Labor Relations Act as to other federal statutes that allow
23 whistle-blowing or independent administrative remedies.²³ As the Board correctly found in
24 *Murphy Oil USA, Inc., supra*, there are important purposes underpinning Section 7 that are not
25 addressed by the Federal Arbitration Act. That equally applies to claims that employees can

26 ²² The Board will avoid the constitutional issue as to the truck drivers because the FAA does not
27 by its terms apply. It could avoid the constitutional issue by finding in agreement with our
28 arguments above that the FAA does not apply where there is no contract of employment or
controversy and thus the FAA does not apply.

²³ The ALJ did not address this issue.

1 make under other federal statutes regarding workplace issues.²⁴ Here, we point out that the
2 FUAP provision effectively undermines those other federal statutes. Thus, the restriction found
3 in the FUAP, that any remedy is “individual” only, would interfere with other federal statutory
4 schemes, which envision and, in some cases, require remedies that will affect a group. The Board
5 has been admonished by the Supreme Court in *Hoffman Plastic Compounds v. NLRB*, 535 U.S.
6 137 (2002), that it must respect other federal enactments. Here, the Board should recognize that
7 there are many federal statutes that allow group, collective or class claims or even individual
8 claims that affect a group. The FAA cannot be used to defeat the purposes of those statutes.

9 Employees have the right to bring to various federal agencies all kinds of issues that affect
10 them and other workers. Under these statutes, they have the right to seek relief from those
11 agencies for their own benefit as well as for the benefit of other workers or employees of the
12 employer. Those remedies can involve government investigations, injunctive relief, and federal
13 court actions by those agencies, and debarment from federal contracts, workplace monitoring and
14 many other remedies that would be collective and concerted in nature.

15 In effect, the FUAP would prohibit an employee from invoking on his/her behalf, as well
16 as on behalf of other employees, protections of these various federal statutes. It would prohibit
17 the agency or the court from remedying violations of the law that the agency or court would be
18 empowered, if not required, to remedy.

19 The Congressional Research Service has identified forty different federal laws that contain
20 anti-retaliation and whistleblower protection. See Jon O. Shimabukuro et al., Cong. Research
21 Serv. Report No. R43045, *Survey of Federal Whistleblower and Anti-Retaliation Laws* (April 22,
22 2013), *available at* <http://fas.org/sgp/crs/misc/R43045.pdf>. These are all laws that relate directly
23 to workplace issues. Nothing in the Federal Arbitration Act preempts the application of other
24 federal laws. Some examples are mentioned below.

25 ²⁴ We emphasize that what is not at issue is the individual right of employees to file claims of any
26 kind with federal agencies or in federal court. Where the action is not concerted and not for
27 mutual aid or protection, the NLRA is not implicated. It is only when the action is concerted
28 and for mutual aid or protection that NLRA Section 7 protection is triggered. This discussion
assumes that an employee may invoke these other federal laws to benefit herself and other
employees.

1 The federal Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*, allows for the District
2 Courts to grant injunctive relief to “restrain violations of [the Act].” See 29 U.S.C. § 217. The
3 application of the FUAP would prevent an individual or a group of individuals from seeking
4 injunctive relief that would apply to all employees or apply in the future to themselves and other
5 employees. It would undermine the purposes behind the FLSA to allow for such injunctive
6 relief.²⁵

7 The same is true with respect to ERISA, 29 U.S.C. § 1001, *et seq.* The FUAP would
8 prohibit an employee from going to court with respect to a claim involving a benefit covered by
9 ERISA, even though the statute expressly allows for equitable relief. 29 U.S.C. § 1132(a)(1) and
10 (3).

11 The FUAP would prevent employees from bringing a complaint to OSHA seeking
12 investigation and correction of worksite problems affecting all employees.

13 The FUAP would prevent an employee from filing an EEOC charge that could lead to
14 EEOC action seeking systemic or class wide relief.

15 The FUAP would prevent employees from bringing unlawful immigration practices to the
16 attention of the Office of Special Counsel. (<http://www.justice.gov/crt/about/osc/>.)

17 The FUAP would prohibit actions under the federal False Claims Act.
18 ([http://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-](http://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf)
19 [FRAUDS_FCA_Primer.pdf](http://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf).) An employee could not, for example, claim that on a federal Davis-
20 Bacon project, the employer made false claims for payment while not paying the prevailing wage.
21 An employee could not claim, along with others, that Hobby Lobby is overcharging on a
22 government contract. See *United States v. Circle C Constr.*, 697 F.3d 345 (6th Cir. 2012). This
23 kind of litigation serves an important public purpose but would be foreclosed by the FUAP. This
24

25
26 ²⁵ Even a claim by an employee that she was not paid for overtime after 40 hours, as required by
27 the FLSA, would not affect commerce. The claim could be based on the promise in the
28 handbook to pay overtime. And because the worker was prohibited from bringing the claim in
court, the bringing of that claim for a few dollars of overtime would not affect commerce for
FAA purposes.

1 kind of claim is necessarily brought as a group action, since the relief sought includes a remedy
2 for the underpayment of a group of workers.

3 The FUAP would prohibit an employee from bringing a claim to the Department of Labor
4 that Hobby Lobby violates the provisions of the Fair Labor Standards Act regarding employment
5 of minors unless the individual were herself an under-aged minor.

6 The FUAP, by its terms, undermines the enforcement of these federal statutes, which
7 envision private efforts to enforce their purposes for all employees and for the public interest.

8 There is no escaping the conclusion that there are a multitude of federal laws that govern
9 the workplace. The FUAP prohibits an employee acting collectively or to benefit others²⁶ from
10 seeking assistance before those agencies and in court to effectuate the purposes of those statutes.
11 The FUAP would prohibit the employee from doing so for the benefit of employees acting
12 collectively. The purposes of those statutes would include not only individual relief for the
13 employee himself or herself, but also relief that would protect the public interest in enforcement
14 of those statutes.²⁷

15 For these reasons, the FUAP itself is invalid, not only because it would prohibit an
16 employee from seeking concerted relief with respect to other federal statutes, but also because it
17 would prohibit the employee from seeking relief that would benefit other employees. The FAA
18 cannot serve to interfere with the enforcement of other federal statutes. As we show, this conflict
19 is particularly heightened with the RFRA, which expressly overrides other federal statutes. The
20 ALJ should expressly rule that the application of the FAA interferes with important policies under
21 other federal statutes.

22
23
24
25 ²⁶ The FUAP would prevent an employee from seeking assistance of others to proceed
26 collectively. An employee could be disciplined for seeking to invoke a collective action on the
theory that this would violate the company policy contained in the FUAP.

27 ²⁷ The Supreme Court has not addressed this issue in any employment arbitration cases since each
28 case has been an individual claim without the argument that the claim serves any public
purpose. *Iskanian, supra*, implicates that issue.

1 **IX. THE FUAP WOULD PROHIBIT COLLECTIVE ACTIONS THAT ARE NOT**
2 **PREEMPTED BY FAA UNDER STATE LAW**

3 This issue is dependent on the fact that the FUAP applies in California and other states
4 with similar statutory schemes.²⁸ The California Supreme Court has ruled recently that an
5 arbitration agreement cannot foreclose application of the Private Attorney General Act, Labor
6 Code § 2699 and 2699.3. See *Iskanian v. C.L.S. Transp.*, 59 Cal.4th 348 (2014), *cert. denied* ____
7 U.S. ____ (2014).²⁹ See also *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425 (9th Cir. 2015).

8 There are numerous other provisions in the Labor Code that permit concerted action. See,
9 e.g., *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal.4th 1109 (2013), *cert. denied*, 134 S.Ct. 2724
10 (2014) (arbitration policy cannot categorically prohibit a worker from taking claims to Labor
11 Commissioner, although state law is also preempted from categorically allowing all claims to
12 proceed before the Labor Commissioner in the face of an arbitration policy).

13 The FUAP would interfere with the substantive right of the California Labor
14 Commissioner to enforce the wage provisions of the Labor Code. See, e.g., Cal. Lab. Code §
15 217.

16 There are, additionally, various provisions in the California Labor Code that allow only
17 the Labor Commissioner to award penalties or grant other relief. The enforcement of the FUAP
18 would prevent employees from collectively going to the Labor Commissioner seeking these
19 penalties for themselves or other employees. It would foreclose an employee from asking the
20 Labor Commissioner to seek remedies for a group of employees. See, e.g., Cal. Lab. Code §
21 210(b) (allowing only the Labor Commissioner to impose specified penalties); Cal. Lab. Code §
22 218 (authority of district attorney to bring action); Cal. Lab. Code § 225.5(b) (penalty recovered
23 by Labor Commissioner). IWC Order 16, Section 18(A)(3), *available at*
24 <https://www.dir.ca.gov/iwc/IWCArticle16.pdf>. Employees could not collectively seek

25
26 ²⁸ The burden is on Hobby Lobby to show that there is no other state law that would apply in the
27 same way.

28 ²⁹ Hobby Lobby operates in many states, and all state law rights would be applicable. Hobby
Lobby must show that all state rights that are not preempted are preserved.

1 enforcement of these remedies because the FUAP prohibits them from bringing claims
2 collectively to that agency.

3 The recently enacted sick pay law is only enforceable by the Labor Commissioner. See
4 Cal. Lab. Code § 245 (effective July 1, 2015). The FUAP would foreclose enforcement of this
5 new law. Individuals or groups of individuals do not have the right to enforce the law in court or
6 before an arbitrator. For purposes of this case, it would foreclose concerted enforcement of the
7 new law since the arbitration process would not be authorized to enforce a law given exclusively
8 to the Labor Commissioner.³⁰ It would prevent other public officers from enforcing state law for
9 a class or group upon complaint by employees. Cal. Bus. & Prof. Code § 17204.

10 Additionally, under state law, there are a number of whistleblower statutes just as there
11 are under federal law. The FUAP would prohibit employees from invoking those statutes for
12 relief that would affect them as well as others. The Labor Commissioner lists thirty-three
13 separate statutes that contain anti-retaliation procedures. See
14 <http://www.dir.ca.gov/dlse/FilingADiscriminationComplaint1.pdf>.

15 California has strong statutory protection for whistleblowers. See Cal. Lab. Code § 1101
16 and 1102. The FUAP defeats the purposes of those statutes that allow groups to bring claims
17 forward to vindicate the public purpose animating those provisions.

18 Just as the California Supreme Court held in *Iskanian*, there are important public purposes
19 animating these statutes that allow employees to seek assistance from either state agencies or the
20 court system. To prevent employees from seeking relief for other employees in the workplace
21 would effectively deprive them of substantive rights guaranteed by state law. The FAA does not
22 preempt such state laws. See *Iskanian*, *supra*.

23 The Board must address the question of the application of *Iskanian* and similar doctrines.
24 The FUAP is invalid because it prohibits the exercise of this important state law right, which
25 serves an important public purpose. Once again, the burden is on Hobby Lobby to prove that the

26
27 ³⁰ Many states have employment laws only enforceable by administrative agencies either in
28 administrative procedures or by those agencies in court. The FUAP deprives employees of the
right to have their claims pursued by such agencies.

FUAP does not interfere with other non-preempted state law.³¹

X. THE FUAP UNLAWFULLY PROHIBITS GROUP CLAIMS THAT ARE NOT CLASS ACTIONS, REPRESENTATIVE ACTIONS, COLLECTIVE ACTIONS OR OTHER PROCEDURAL DEVICES AVAILABLE IN COURT OR OTHER FORA

The cases focus on the rights of employees to use collective procedures in courts and other fora. Here, we make the point that employees have the right to bring their collective disputes together as a group. Or a group or individual can represent others to bring a group complaint.³² The FUAP prohibits such group claims or consolidation.³³

This is an essential point here. It responds to the repeated dissents of Member Miscimarra and former Member Johnson. This point responds to arguments made by Hobby Lobby. These are claims brought by two or more employees. There is no need to invoke class action, collective action or any procedural form of collective actions. It is just two or more employees bringing the same claim and assisting each other.³⁴ Alternatively, it can be two or more employees bringing a complaint that would require the participation of other employees and would affect them.³⁵ The Board needs to make it clear that such group claims stand apart from class actions, collective actions, and representative actions that invoke court adopted procedures.

XI. THE FUAP IS INVALID AND INTERFERES WITH SECTION 7 RIGHTS TO RESOLVE DISPUTES BY CONCERTED ACTIVITY OF BOYCOTTS, BANNERS, STRIKES, WALKOUTS AND OTHER ACTIVITIES

The FUAP is invalid because it makes it clear that the employees are limited to the arbitration procedure to resolve disputes. It applies to all disputes, not just disputes that could be brought in a court or before any agency. It governs any “dispute, demand, claim, controversy.” This would foreclose the employees from engaging in strikes or boycotting activity, expressive

³¹ The ALJ declined to undertake this analysis. ALJD fn. 7.

³² There would be no 8(a)(2) issue if the employer allowed one employee to represent others in one dispute. That representation would not create a labor organization.

³³ As to this theory, the Board does not have to address the argument that employees do not have the right to invoke the formalized procedures available in court such as class actions or collective actions.

³⁴ The ALJ failed to address this issue.

³⁵ The other employees would be “necessary” or “indispensable” parties. One example would be disputes about scheduling or harassment by other employees. The laws enacted around the country regarding fair scheduling would not be enforceable in arbitration.

1 activity or other public pressure campaigns. This is a form of a yellow dog contract. Here,
2 employees agree that they shall use only the arbitration procedure to resolve disputes with the
3 employer, and thus they would be violating the arbitration procedure if they were to use another
4 forum, such as a public protest or a strike. It prohibits all forms of concerted activity because it
5 requires that employees use the arbitration procedure. Any employee who violates this rule
6 would be subject to discipline just as he/she would be for violating any other employer rule. This
7 is a fundamentally illegal waiver of the Section 7 right to engage in lawful economic activity,
8 including boycotting, picketing, striking, leafleting, bannerling and other expressive activity. That
9 language is contained in both FUAPs. It is also contained in the employee application.³⁶

10 As we have also noted above, the employer's policies make it plain that employees could
11 be disciplined for not complying with employer policies. Policy 18 indicates that employees will
12 be disciplined for: "Engaging in such conduct as may be consistent with any other Company's
13 policies, procedures, practices or rules." See JX 2I p. 30 and JX J p. 29. This unambiguously
14 includes the FUAP, which is a company policy.

15 This is furthermore emphasized by the employer's "non-union statement." See JX I p. 9
16 and JX J p. 9-10. Since that policy is clearly a Company policy, any opposition to that policy
17 would subject an employee to discipline under Rule 18, quoted above. That Union activity could
18 certainly include seeking a Union's assistance in negotiating a better arbitration provision or in
19 invoking the FUAP. Fundamentally, it also would make it unlawful to engage in Union activities
20 such as a strike, picketing, bannerling or other concerted activity. The Board's recognition that
21 the FUAP is an unlawful yellow dog contract under the Norris-LaGuardia Act, reaffirms that but
22 does not go far enough. If the FUAP is unlawful under the Norris-LaGuardia Act and Section 7,
23 it is unlawful because it prohibits other concerted means of resolving disputes. Employees are

24
25
26
27
28 ³⁶ The ALJ did not address this issue.

1 not limited to bring claims concertedly before courts or agencies.³⁷ They can do so by direct
2 action.³⁸

3 The FUAP is an unlawfully imposed no-strike, no boycott, no bannering, no leafleting and
4 no concerted activity ban. It is the worst form of a yellow dog contract.

5 **XII. THE FUAP IS UNLAWFUL BECAUSE IT WOULD PROHIBIT SALTING AND**
6 **APPLIES AFTER EMPLOYMENT ENDS**

7 The FUAP would extend to someone who became employed for the purpose of salting,
8 improving working conditions and organizing since it would restrict his/her right to engage in
9 concerted activity and organize.³⁹ It would prohibit the salt from assisting other employees in
10 pursuing collective claims. Moreover, the FUAP purports to govern even after an employee quits
11 or is fired. If the employee chooses to quit because of miserable working conditions or to
12 organize, she is barred from acting collectively. Hobby Lobby cannot bar an employee who has
13 terminated any employment agreement from acting collectively on behalf of either current
14 employees or other former employees.⁴⁰

15 **XIII. THE FUAP IS UNLAWFUL AND INTERFERES WITH SECTION 7 RIGHTS**
16 **BECAUSE IT FORECLOSES GROUP CLAIMS BROUGHT BY A UNION AS A**
17 **REPRESENTATIVE OF AN EMPLOYEE OR EMPLOYEES**

18 The FUAP prohibits a union that represents an unrepresented employee from representing
19 that employee in the arbitration procedure.⁴¹ That is, it would prohibit a union from acting on
20 behalf of an employee, not as the collective representative of the group, but rather as the
21 representative of the individual employee. It would also prevent a union from acting as the
22 minority representative or members-only representative of an employee or group of employees.

23 ³⁷ Surely every employer would rather force employees to resolve disputes in the least friendly
24 fora: the courts and arbitration. The Norris-LaGuardia Act and the NLRA protect the right of
25 employees to settle disputes in the most effective manner: collective action in the streets.

26 ³⁸ See below where we address the need to overrule *Lutheran Heritage-Village Livonia*, 343
27 NLRB 824 (1998). Under current Board law however this ambiguity should be construed
28 against Hobby Lobby. See *Murphy Oil*, supra, at *26 and other cases cited below.

³⁹ The ALJ did not address this issue.

⁴⁰ Some state laws, such as California law, prohibit noncompete clauses. This would conflict
with such provisions.

⁴¹ The ALJ did not address this issue.

1 Such activity is protected. It would prevent a union from acting on behalf of a group of
2 employees.

3 The FUAP prohibits a union that is recognized or certified from representing employees.

4 The FUAP would prevent a union, as the representative of its members, or non-labor
5 organization worker center from representing its members where authorized under state or federal
6 law. See *Soc. Servs. Union, Local 535 v. Santa Clara Cty.*, 609 F.2d 944 (9th Cir. 1979) (Union
7 may act as representative of its members in class action); *United Food & Commercial Workers*
8 *Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544 (1996) (union has associational standing on
9 behalf of its members); *Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson*, 102
10 F.R.D. 457 (N.D. Cal. 1983); *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of*
11 *Am. v. Brock*, 477 U.S. 274 (1986).⁴²

12 The FUAP would prevent a federally recognized Joint Labor Management Committee
13 from pursuing claims. See 29 U.S.C. § 175a.

14 On all these grounds, the FUAP is unlawful.

15 **XIV. THE FUAP IS UNLAWFUL BECAUSE IT IMPOSES ADDITIONAL COSTS ON**
16 **EMPLOYEES TO BRING EMPLOYMENT RELATED DISPUTES**

17 Although this FUAP does not contain a fundamental flaw that would require an employee
18 to pay arbitration costs, it necessarily increases the costs of employees who bring claims
19 concerning working conditions. They cannot share expert witness fees, deposition costs, copying
20 costs, attorney's fees and many other costs associated with bringing and pursuing claims.
21 Bringing them as a group includes sharing those costs. Sharing costs is concerted activity. Thus,
22 the FAUP expressly penalizes workers by increasing their costs in violation of Section 7.

23 **XV. THE FUAP IS UNLAWFUL BECAUSE IT WOULD PROHIBIT AN EMPLOYEE**
24 **OF ANOTHER EMPLOYER FROM ASSISTING A HOBBY LOBBY EMPLOYEE**
25 **OR JOINING WITH A HOBBY LOBBY EMPLOYEE TO BRING A CLAIM**

26 Separately, an employee of any other employer is also an employee within the meaning of
27 the Act. *Eastex v. NLRB*, 437 U.S. 556 (1978). Such other employee could assist an employee of

28 ⁴² It would prohibit an employee from joining a non-labor organization that brought litigation
against Hobby Lobby on issues affecting working conditions. An employee could not join a
worker center, for example, that brought claims by other employees.

1 Hobby Lobby or join with a claim brought by a Hobby Lobby employee.⁴³ The rights of all other
2 employees of other employers are violated by the FUAP independently of whether it violates just
3 the Section 7 rights of Hobby Lobby employees. The FUAP cannot apply to an employee of
4 another employer, nor can it prohibit a Hobby Lobby employee from joining with an employee of
5 another employer.

6 Furthermore, it would prohibit employees of Hobby Lobby from bring group complaints
7 with employees of “affiliates, subsidiaries, officers, directors, agents, attorneys, representative
8 and/or other employees” described in the FUAP even though those “affiliates, subsidiaries,
9 officers, directors, agents, attorneys, representative and/or other employees” are not parties to the
10 FUAP.

11 **XVI. BECAUSE THE EMPLOYER ALLOWS GROUP CLAIMS TO BE BROUGHT, IT**
12 **HAS NO VALID BUSINESS JUSTIFICATION TO PRECLUDE THEM IN**
13 **ARBITRATION**

14 The Employer allows employees to bring group claims or concerns concertedly to
15 management’s attention. JX 2I p. 12 and JX J p. 12–13 (Open Door Policy). Thus, the Employer
16 allows group claims but forecloses them only when the dispute gets to arbitration. Any legitimate
17 purpose in limiting group, collective or class claims is undermined if the employer allows groups
18 to bring claims concertedly to management’s attention.

19 Even if the FAA did apply and the federal cases that limit the ability of a party to invoke a
20 class-wide arbitration when the arbitration agreement does not explicitly call for group resolution
21 were relevant, the Employer here has negated the limitation by its own policy. Hobby Lobby has
22 an open door policy under which it accepts and resolves group complaints. “It is equally well
23 settled that the advancement of a collective grievance is protected activity, even if the grievance
24 in question is not formally stated or does not take place under the auspices of a contractual
25 grievance procedure.” *D. R. Horton*, 357 NLRB No. 184, p. 3 (2012), quoting *Clara Barton*
26 *Terrace Convalescent Ctr.*, 225 NLRB 1028, 1033 (1976). There is no justifiable rationale

27 ⁴³ The ALJ did not address this issue.
28

1 allowing for group complaints at every stage of dispute resolution other than the final step of
2 arbitration.

3 Applying the tests of either *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), or *NLRB v.*
4 *Great Dane Trailers*, 388 U.S. 26 (1967), this conduct is destructive of Section 7 rights because it
5 limits Section 7 activity on its face without a business justification.⁴⁴ Here, moreover, it
6 discourages union activity where the employees have selected a union as their representative but
7 are precluded from engaging the union to pursue group claims on their behalf.

8 **XVII. THE FUAP IS UNLAWFUL AND INTERFERES WITH SECTION 7 RIGHTS**
9 **BECAUSE IT APPLIES TO PARTIES WHO ARE NOT THE EMPLOYER BUT**
10 **MAY BE AGENTS OF THE EMPLOYER OR EMPLOYERS OF OTHER**
11 **EMPLOYEES UNDER THE ACT**

12 The FUAP is invalid because it applies to other employers. The FUAP extends to
13 disputes with the Company, its “affiliates, subsidiaries, officers, directors, agents, attorneys,
14 representatives and/or other employees.” None of them is bound to arbitrate claims against the
15 employee except the Company itself. It does not bind its “ affiliates, subsidiaries, officers,
16 directors, agents, attorneys, representatives and/or other employees” affiliated with the employer
17 and so on. Each of these persons could be an employer or joint employer within the meaning of
18 the Act. Yet, the employee is bound to arbitrate claims against those individuals where those
19 claims arise out of wages, hours and working conditions to the extent they are the employer.

20 There are many wage and hour statutes, including the Fair Labor Standards Act, the
21 California Fair Employment and Housing Act and provisions of the Labor Code, that can impose
22 joint liability.⁴⁵ Thus, the FUAP prohibits Section 7 activity against parties who are not the
23 employer and thus is overbroad and invalid. This would affect the employees’ right to bring
24 claims against joint employer relationships. See *Browning-Ferris Indus.*, 362 NLRB No. 186
(2015).

25 ⁴⁴ As noted below, the ALJ refused to allow the charging party to prove that the arbitration
26 procedure is inefficient, expensive and serves no legitimate purposes. Exception has been
27 taken to the refusal of the ALJ to allow the Committee to prove this.

28 ⁴⁵ In addition, this effort to limit claims against benefit plans is prohibited by ERISA, 29 U.S.C. §
1140, since it interferes with the rights of employees to bring claims against benefit plans.

Moreover, there is no contract between any employee and these third parties. So the FAA cannot apply. The FUAP cannot apply to non-parties to any agreement with the employees. *First Options v. Kaplan*, 514 U.S. 938 (1995).

XVIII. THE FUAP IS UNLAWFUL AND INTERFERES WITH SECTION 7 RIGHTS BECAUSE IT RESTRICTS THE RIGHT OF WORKERS TO ACT TOGETHER TO DEFEND CLAIMS BY THE EMPLOYER AGAINST THEM

Employees have the right to band together to defend against claims made by the Employer or other employees.⁴⁶ Although an employee might choose to refrain from concerted activity against the employer, that employee may wish to engage in joint activity where there are joint or related claims against several employees.

The FUAP imposes a very heavy burden on employees who may be jointly the subject of a claim by the company against them. Under the FUAP, they could not jointly defend themselves but would have to defend themselves individually in separate actions. The employer may have claims against multiple employees, such as overpayments for wages or breach of confidentiality provisions. There may be cross-claims, counter-claims or claims for indemnification. The employees are entitled to defend such claims or pursue such claims jointly and concertedly.⁴⁷ The FUAP is facially invalid since it prohibits group action to defend against claims jointly.⁴⁸

XIX. THE FUAP IS UNLAWFUL UNDER THE NORRIS-LAGUARDIA ACT

The Norris–LaGuardia Act, 29 U.S.C. § 101 et seq., states that, as a matter of public policy, employees “shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of . . . representatives [of their own choosing] or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 102 (emphasis added). The Act declares that any “undertaking or promise in conflict with the public policy declared in section 102 . . . shall not be

⁴⁶ The ALJ did not address this issue.

⁴⁷ The FUAP specifically prohibits consolidation. This would be a useful procedure for employees to concertedly defend claims.

⁴⁸ For example, employees would have to hire lawyers who would cost more for individual representation. Employees could not share the costs of expert witnesses, document production, depositions etc. The simple fact that individual actions increase the costs on the workers makes it a penalty and violates Section 7.

1 enforceable in any court of the United States.” 29 U.S.C. § 103. The FUAP plainly interferes
2 with the rights guaranteed by this federal law. The FAA does not eliminate the rights guaranteed
3 by the Norris-LaGuardia Act. This argument is fully explored in the law review article written by
4 Professor Matthew Finkin, “The Meaning and Contemporary Vitality of the Norris-LaGuardia
5 Act,” 93 Neb L. Rev 1 (2014). He forcefully argues that an agreement to waive collective actions
6 is a quintessential yellow dog contract prohibited by the Norris-LaGuardia Act. The ALJ agreed.
7 We repeat this here to reinforce our arguments.

8 **XX. THE FUAP IS INVALID BECAUSE IT IS UNCLEAR AS TO WHAT IT COVERS,**
9 **AND THEREFORE IT IS OVERBROAD; THE DECISION IN LUTHERAN**
10 **HERITAGE VILLAGE-LIVONIA SHOULD BE OVERRULED; THE BOARD HAS**
11 **NOW EFFECTIVELY OVERRULED LUTHERAN HERITAGE VILLAGE-**
12 **LIVONIA AND SHOULD EXPRESSLY DO SO**

13 **A. INTRODUCTION**

14 The FUAP is ambiguous as to what it covers. The parties dispute, for example, whether
15 the FUAP covers matters brought to the NLRB. It isn’t clear how it applies to the federal False
16 Claims Act and various whistleblower statutes. Fundamentally, Charging Party explains above
17 that other company policies govern the FUAP. If Hobby Lobby disputes that those policies apply
18 to the FUAP, it has created the kind of uncertainty that should be construed against it. This
19 ambiguity certainly extends to whether the FUAP prohibits or limits employee rights to file
20 charges with the National Labor Relations Board. *Professional Janitorial Serv.*, 363 NLRB No.
21 35 (2015).

22 Recently, the Board has made it clear that, where language “creates an ambiguity,” that
23 ambiguity “must be construed against the Respondent as the drafter of the [rule].” *Murphy Oil*
24 *U.S.A., Inc.*, 361 NLRB No. 72 at *26 (2014). *Professional Janitorial Serv.*, *supra*, at n. 8, and
25 *Caesars Entertainment*, 362 NLRB No. 190 at *1 (2015). The Board relied upon its prior
26 decision in *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enforced*, 203 F.3d 52 (D.C. Cir.
27 1999) in reaching this conclusion. Thus, since the FUAP is unclear, it should be construed
28 against the company to prohibit all forms of concerted activity and thus is overbroad.

1 Additionally, this case illustrates precisely why the Board’s decision in *Lutheran Heritage*
2 *Village-Livonia*, 343 NLRB 646 (2004), should be overruled.⁴⁹

3 **B. THE BOARD SHOULD DISCARD LUTHERAN HERITAGE VILLAGE-**
4 **LIVONIA TO THE TRASH HEAP OF DISCREDITED DECISIONS**

5 The Board should return to the rule established in *Lafayette Park Hotel*, 326 NLRB 824
6 (1998). The Board in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), imposed an
7 unworkable and unreasonable doctrine for evaluating when employer-maintained rules are
8 unlawful. It modified the previously existing rule expressed in *Lafayette Park Hotel*, 326 NLRB
9 824 (1998). See also *Ark Las Vegas Rest. Corp.*, 343 NLRB 1281, 1283 (2004) (any ambiguity in
10 a rule that restricts concerted activity can be construed against the employer).

11 The Board’s application of the *Lutheran Heritage Village-Livonia* rule ignores the basic
12 concept that if some employees can read the language as interfering with Section 7 rights, then
13 there is a violation because some employees have had their rights unlawfully interfered with or
14 restricted. The fact that someone may be able to read the rule as not reaching Section 7 activity
15 allows employers to chill the Section 7 rights of those who reasonably read the rule as reaching
16 Section 7 activity. Those who read the rule as not to limit Section 7 activity may have no interest
17 in such activity. They may assert their right to “refrain from such activity.” But those who
18 choose to engage in such activity have their conduct chilled, if not prohibited. The Board’s rule
19 is a form of tyranny of some or a few over the rights of those who want to engage in Section 7
20 activity. If an employer’s action interferes with the Section 7 rights of one employee, the
21 conduct violates the Act. The *Lutheran Heritage Village-Livonia* rule assumes that conduct
22 violates the Act only if many, and probably a majority, would have their rights violated. Such a
23 rule should be discarded and thrown into the trash pile of discredited doctrines.

24 In *Lutheran Heritage Village-Livonia*, the Board adopted the following presumption:

25 Where, as here, the rule does not refer to Section 7 activity, we will
26 not conclude that a reasonable employee would read the rule to
27 apply to such activity simply because the rule *could* be interpreted
28 that way. To take a different analytical approach would require the

⁴⁹ Furthermore, to the extent the rules discussed in Part VI above are ambiguous, they should be
construed against Hobby Lobby.

1 Board to find a violation whenever the rule could conceivably be
2 read to cover Section 7 activity, even though that reading is
unreasonable. We decline to take that approach.

3 *Lutheran Heritage Village-Livonia*, 343 NLRB at 647.

4 This doctrine has created confusion and uncertainty in the application of rules. Moreover,
5 it is an illogical statement. If the “rule could be interpreted that way [to prohibit Section 7
6 activity],” the rule should be unlawful. We are not suggesting that if that “reading is
7 unreasonable,” it should violate the Act. Only if the rule can be reasonably read to interfere with
8 Section 7 activity should it be found unlawful. This is the rule of ambiguity. If the rule is
9 ambiguous and could reasonably be read by some to interfere with or prohibit Section 7 activity,
10 it should be unlawful. Here, this is heightened by the fact that, as illustrated above, the
11 Employer’s Chief Executive Officer cannot explain the scope of the FUAP. If he can’t do so, no
12 employee can easily construe it. In fact, we believe that in most cases, if you ask the president of
13 the company to explain their corporate rules, they can’t explain how they would apply in most
14 common circumstances where Section 7 rights are at issue. This case incisively illustrates why
15 *Lutheran Heritage Village-Livonia* should be overruled.

16 The Board’s prior rule in *Lafayette Park Hotel*, cited above, is to construe any ambiguity
17 against the employer. This has been the consistent application in many areas of law, including
18 the Board’s application of employer-created rules. After all, the employer has control over what
19 it says, and it can implement language that is not vague or ambiguous. This is inherently true of
20 most employer rules, but quite clear in this case. Only the employer benefits from chilling and
21 restricting Section 7 activity. Recently, the Board seemed to have made it plain in *Murphy Oil*,
22 *supra*, where there is an ambiguity it would be construed against the Employer.

23 A worker is not at fault if the employer makes a statement that is ambiguous and could
24 affect or chill Section 7 rights. The employer statement should be construed against the
25 employer. Where there is any reasonable interpretation of the rule that could interfere with
26 Section 7 activity, the rule should be deemed unlawful. Employers will necessarily make rules
27 ambiguous to chill such activity unless required to make them clear. Ambiguity gives them wider

1 discretion and more power. Such ambiguities necessarily coerce some employees.

2 This interpretation has become one by which the Board ignores the illegal yet reasonable
3 interpretation as long as there is a reasonable interpretation that is not unlawful. The Board has
4 turned the law on its head; where there is a reasonable interpretation that the rule does not affect
5 Section 7 rights, which only a few employees may apply, it makes no difference that most or
6 many of the employees would apply a reasonable interpretation that the rule prohibits Section 7
7 activity.

8 Put in other words, the burden should be on the drafter and maintainer of a rule to prove
9 that “no employee,” not a single one, “would reasonably construe” the rule in a way to cover or
10 limit Section 7 activity. If any employee could reasonably construe the rule as limiting Section 7
11 activity, it would be unlawful.

12 This is further illustrated by the Board’s recent decision in *Three D, LLC d/b/a Triple Play*
13 *Sports Bar & Grille*, 361 NLRB No. 31 (2014). The majority found the “term ‘inappropriate’ to
14 be ‘sufficiently imprecise’ that employees would reasonably understand it to encompass
15 ‘discussion and interactions protected by Section 7.’” Slip Opinion p. 7. This is almost a
16 formulation that where there is an ambiguity in a phrase or rule it should be construed against the
17 drafter and enforcer of the rule, namely the employer. This contradicts, to some degree, the later
18 statement that “many Board decisions [] have found a rule unlawful if employees would
19 reasonably interpret it to prohibit protected activities.” Slip Opinion p. 8. The word “would”
20 should be replaced with the word “could.” This would shift the burden to the employer to clarify
21 its rules to eliminate interference with Section 7 rights.

22 Recently, the Board has also made it clear that where language “creates an ambiguity,”
23 that ambiguity “must be construed against the Respondent as the drafter of the [rule].” *Murphy*
24 *Oil U.S.A., Inc.*, 361 NLRB No. 72 at *19 (2014). The Board relied upon its prior decision in
25 *Lafayette Park Hotel*, 326 NLRB No. 824, 828 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999).
26 Here, there are patent ambiguities in the FUAP and the policies governing the FUAP. Thus, there
27 is an ambiguity created that must be construed in light of *Murphy Oil* against the drafter of the
28

1 rules, namely the employer.⁵⁰ Under these circumstances, this is the perfect case in which to
2 overrule *Lutheran Heritage Village-Livonia*. It is particularly an appropriate case in which to
3 overrule that doctrine because the employer couldn't explain the rules. If the employer can't
4 explain the rules, no employee could be expected to understand what position or conduct is
5 prohibited or permitted.

6 The *Lutheran Heritage Village-Livonia* application has allowed an interpretation of
7 employer rules to be created from the employer perspective rather than from the view of a
8 worker. Where the worker could read any reasonable interpretation into the rule that would
9 prohibit Section 7 activity, it is overbroad as to that worker or a group of workers. The fact that
10 some workers might reasonably construe it not to prohibit such Section 7 activity does not
11 invalidate the fact that at least some employees could reasonably read the rule to prohibit Section
12 7 activity, and thus the rule would chill those activities. Where one employee understands the
13 rule to prohibit Section 7 protected activity, at least an interference with Section 7 activity has
14 been created.

15 We quote at length the dissent, and we will ask this Board to return to the view of the
16 dissent:

17 In *Lafayette Park Hotel, supra* at 825, the Board recognized that
18 determining the lawfulness of an employer's work rules requires
19 balancing competing interests. The Board thus relied upon the
20 Supreme Court's view, as stated in *Republic Aviation v. NLRB*, 324
21 U.S. 793, 797-798 (1945), that the inquiry involves "working out an
22 adjustment between the undisputed right of self-organization
23 assured to employees under the Wagner Act and the equally
24 undisputed right of employers to maintain discipline in their
25 establishments." 326 NLRB at 825. While purporting to apply the
26 Board's test in *Lafayette Park Hotel*, the majority loses sight of this
27 fundamental precept. Ignoring the employees' side of the balance,
28 the majority concludes that the rules challenged here are lawful
solely because it finds that they are clearly intended to maintain
order in the workplace and avoid employer liability. The majority's
incomplete analysis belies the objective nature of the appropriate
inquiry: "whether the rules would reasonably tend to chill
employees in the exercise of their Section 7 rights."

50 It is worth noting that these rules were adopted in 2002 and haven't been modified since then.
Thus, the employer has made no effort to comply with current Board law.

1 Our colleagues properly acknowledge that even if a “rule does not
2 explicitly restrict activity protected by Section 7,” it will still violate
3 Section 8(a)(1) if—among other, alternative possibilities—
4 “employees would reasonably construe the language to prohibit
5 Section 7 activity.” On this point, of course, the established test
6 does not require that the only reasonable interpretation of the rule is
7 that it prohibits Section 7 activity. To the extent that the majority
8 implies otherwise, it errs. Such an approach would permit Section
9 7 rights to be chilled, as long as an employer's rule could
10 reasonably be read as lawful. This is not how the Board applies
11 Section 8(a)(1). See, e.g., *Double D Construction Group, Inc.*, 339
12 NLRB 303, 304 (2003) (“The test of whether a statement is
13 unlawful is whether the words could reasonably be construed as
14 coercive, whether or not that is the only reasonable construction”).

15 The majority asserts that it has considered the employees' side of
16 the balance, in that it has found that the purpose behind the
17 Respondent's rules—to maintain order and protect itself from
18 liability—is so clear that it will be apparent to employees and thus
19 could not reasonably be misunderstood as interfering with Section 7
20 activity. Although the Respondent's assertedly pure motive in
21 creating such rules may be crystal clear to our colleagues, it may
22 not be as obvious to the Respondent's employees, especially in light
23 of the other unlawful rules maintained by the Respondent. Rather,
24 for reasons explained below, we find that the challenged rules are
25 facially ambiguous. The Board construes such ambiguity against
26 the promulgator. *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992),
27 quoting *Paceco*, 237 NLRB 299 fn. 8 (1978).

28 *Id.* at 650 (footnote omitted).

This reasoning was correct then and governs now.

C. THE BOARD HAS EFFECTIVELY OVERRULED *LUTHERAN HERITAGE VILLAGE-LIVONIA* BY APPLYING THE RULE OF CONSTRUING AMBIGUITIES AGAINST THE EMPLOYER

The Board has already effectively overruled *Lutheran Heritage Village-Livonia*. It has in recent cases made it clear that “[w]here employees would reasonably read an ambiguous rule to restrict their Section 7 rights, the Board construes the ambiguity in the rule against the rule’s promulgator. See *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enfd.*, 203 F.3d 52 (D.C. Cir. 1999). *Professional Janitorial Serv.*, 363 NLRB No. 35, n.8 (2015), *Murphy Oil USA*, *supra*, and *Caesars Entertainment*, *supra*. *Lutheran Heritage Village-Livonia* cannot survive the logic. Once there is an ambiguity, some employees will construe the rule to prohibit Section 7 activity. It is then inconsistent to hold that when the hypothetical employee who is deemed reasonable (meaning the NLRB) reads it one way, the Board ignores the other reasonable employees who

1 read the rule to proscribe Section 7 activity. In effect, the Board has overruled *Lutheran Heritage*
2 *Village-Livonia*, and it should now so state.

3 **D. CONCLUSION**

4 In summary, *Lutheran Heritage Village-Livonia* should be overruled. Alternatively the
5 Board should concede that it has effectively done so.

6 **XXI. THE ALJ IMPROPERLY APPROVED THE JOINT MOTION OF THE**
7 **GENERAL COUNSEL AND THE RESPONDENT TO SUBMIT THIS MATTER**
8 **ON A STIPULATED RECORD**

9 The Charging Party objected to the submission of this case on the stipulated record. The
10 ALJ overruled those objections in an Order dated June 29, 2015.. The Charging Party advances
11 this Exception as to evidence and arguments that would further support the application of the
12 RFRA discussed below and other issues. We construe the Objections as offers of proof which
13 were rejected in that Order issued by the ALJ.

14 The Charging Party offered to prove that the brand of religion espoused by Hobby Lobby
15 and its owners has a core tenet of concerted protected activity. That is, the religion encourages its
16 members and adherents to engage in helping workers improve their wages, hours and working
17 conditions through concerted activity. Workers are taught that it is a core principle of the religion
18 that people should help other people with respect to their daily lives. Included in those precepts is
19 encouraging members and adherents of the religion to help others, whether they are members or
20 adherents of the religion or not, with their workplace issues affecting wages, hours and working
21 conditions. This is quintessential concerted activity for mutual aid or protection.⁵¹

22 The Charging Party offered to prove that Hobby Lobby, on many occasions, has
23 encouraged employees to work with other employees to resolve workplace issues. Hobby Lobby
24 has often brought employees together to work out issues involving wages, hours and working
25 conditions among themselves and with management. The employees have been counseled that
26 working together to resolve these problems is a religious belief and tenet.

27 ⁵¹ The ALJ considered this issue beyond the scope of the General Counsel's case. This argument
28 advanced by the Charging Party did not change the General Counsel's case, it advanced a legal
argument in support. Under the ALJ reasoning, Respondents or Charging Party could not raise
any other legal argument. Cf. *Hoffman Plastic Compounds v. NLRB* 535 U.S. 137 (2002)

1 The Charging Party offered to prove that, as part of the brand of religion espoused by
2 Hobby Lobby and its owners, owners of businesses (i.e., employers) are encouraged to share their
3 wealth with their employees. They are also encouraged to share their wealth with employees of
4 other employers. This is quintessential good faith bargaining.

5 The Charging Party offered to prove that the same is true of many other religions.

6 The Charging Party offered to prove that this is a core principle of other religions.

7 The Charging Party offered to prove that, as part of these core tenets, religions teach that
8 employees should work together to assist each other to improve their working conditions,
9 including working conditions that affect each other, and in working out their problems regarding
10 wages, hours and working conditions with their employers.

11 The Charging Party offered to prove that these are core tenets of religions of employees of
12 Hobby Lobby and employees of other employers. Further, the Charging Party offered to prove
13 that employees of Hobby Lobby and other employers hold these views as sincere religious
14 beliefs.

15 The Charging Party offered to prove that the arbitration procedure contained in Hobby
16 Lobby's policies, either using the American Arbitration Association or the Christian Conciliation,
17 is a process that is time consuming, expensive and inefficient. The Charging Party will prove that
18 it is not more inexpensive, efficient and streamlined than court proceedings. The procedures do
19 not serve the purposes of the Federal Arbitration Act and also interfere with effective vindication
20 of Section 7 rights.

21 The Charging Party offered to prove that Hobby Lobby has disciplined many employees
22 for violations of company policies. The Charging Party offered to prove that employees have
23 been warned, counseled, suspended and discharged for violation of many company policies.

24 Thus, employees would reasonably understand that a violation of the FUAP could lead to
25 discipline.

26 The Charging Party offered to prove the Rules of the American Arbitration Association
27 require confidentiality, which interferes with the Section 7 rights of employees to disclose the
28

1 proceedings. The Rules of the Christian Conciliation encourage application of religious
2 principles, which include the above tenet of employees helping other employees solve workplace
3 disputes. The Rules of the Christian Conciliation do not prohibit group, collective, class or
4 representative actions.

5 Charging Party offered to prove that some of the “affiliates, subsidiaries, officers,
6 directors, agents, attorneys, representative and/or other employees” described in the FUAP are
7 employers within the meaning of 29 U.S.C. § 152(2) and that those employer commerce activities
8 fall within the Board’s jurisdiction.

9 The Charging Party offered to prove that arbitration is not a speedy, efficient or
10 expeditious remedy. The ALJ rejected this as contrary to Board precedent. See Order p 2. But
11 the Board has never ruled on a factual record that arbitration serves any business purpose other
12 than to make concerted activity more difficult and virtually impossible. Without establishing the
13 legitimate business purpose, the FUAP cannot withstand a challenge. See Robert Gorman and
14 Matthew Finkin, “Labor Law Analysis and Advocacy, (JURIS 2013) Chpater 8.2 (explaining
15 basis of right of employer to limit Section 7 activity depends on business justification)

16 **XXII. THE RELIGIOUS FREEDOM RESTORATION ACT EXTENDS TO THE CORE**
17 **RELIGIOUS ACTIVITY OF HELPING OTHER WORKERS, AND THE FAA,**
18 **NLRA AND NORRIS-LAGUARDIA ACT HAVE TO BE APPLIED TO PROTECT**
THIS RELIGIOUS RIGHT

19 Section 7 protects the right of employees to engage in concerted protected activity. That
20 extends to asking for help in work place issues from other employees. *Fresh & Easy*
21 *Neighborhood Market*, 361 NLRB No 12 (2014). Such concerted activity is a central principle of
22 religion, including the brand of religion that Hobby Lobby professes in the work place. Section 7
23 activity is a core religious activity. The solidarity principle drawn from this case is the essence of
24 religion. Protected concerted activity for mutual aid and protection is core religious activity.

25 In 1993, Congress enacted the Religious Freedom Restoration Act. 42 U.S.C. § 2000bb–
26 2000bb-4. It was enacted in response to a Supreme Court decision, *Employment Division v.*
27 *Smith*, 494 U.S. 872 (1990), which many saw as restricting the exercise of religion.

28 The Act in relevant part provides:

1 (a) In general

2 Government shall not substantially burden a person's exercise of
3 religion even if the burden results from a rule of general
4 applicability, except as provided in subsection (b) of this section.

5 (b) Exception

6 Government may substantially burden a person's exercise of
7 religion only if it demonstrates that application of the burden to the
8 person--

9 (1) is in furtherance of a compelling governmental interest; and

10 (2) is the least restrictive means of furthering that compelling
11 governmental interest.

12 (c) Judicial relief

13 A person whose religious exercise has been burdened in violation
14 of this section may assert that violation as a claim or defense in a
15 judicial proceeding and obtain appropriate relief against a
16 government. Standing to assert a claim or defense under this section
17 shall be governed by the general rules of standing under article III
18 of the Constitution.

19 The statute does not apply to state government. See, *City of Boerne v. P. F. Flores*, 521
20 U.S. 507 (1997).⁵²

21 The RFRA has been the subject of litigation. It, however, came boldly to the attention of
22 the public in *Burwell v. Hobby Lobby Stores, Inc.*, *supra*.

23 Hobby Lobby operates according to “Christian” principles;
24 Hobby Lobby's statement of purpose commits the Greens to
25 “[h]onoring the Lord in all [they] do by operating the company in a
26 manner consistent with Biblical principles.” App. in No. 13–354,
27 pp. 134–135 (complaint). Each family member has signed a pledge
28 to run the businesses in accordance with the family's religious
beliefs and to use the family assets to support Christian ministries.
723 F.3d, at 1122. In accordance with those commitments, Hobby
Lobby and Mardel stores close on Sundays, even though the Greens
calculate that they lose millions in sales annually by doing so. *Id.*, at
1122; App. in No. 13–354, at 136–137.

Burwell v. Hobby Lobby Stores, Inc., *supra*, 134 S.Ct. at 2766.

Moreover, the Court noted:

⁵² Congress subsequently amended the RFRA to apply, in part, to certain state actions. See
Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et seq.*

1 Even if we were to reach this argument, we would find it
2 unpersuasive. As an initial matter, it entirely ignores the fact that
3 the Hahns and Greens[owners of Hobby Lobby] and their
4 companies have religious reasons for providing health-insurance
5 coverage for their employees. Before the advent of ACA, they were
6 not legally compelled to provide insurance, but they nevertheless
7 did so—in part, no doubt, for conventional business reasons, but
8 also in part because their religious beliefs govern their relations
9 with their employees. See, App. to Pet. for Cert. in No. 13–356, p.
10 11g; App. in No. 13–354, at 139.

11 *Id.*

12 The statement of purpose described above comes directly from the Employee Handbook.
13 See, JX 2I p. 6 and JX 2J p. 6.⁵³ The Supreme Court in *Burwell* held that the application of a
14 portion of the Affordable Care Act imposes substantial burden on the religious beliefs of the
15 owners of Hobby Lobby. It did so because there was a regulation requiring that contraceptives be
16 provided over the religious objections of the owners. The Court held that this “contraceptive
17 mandate imposes a substantial burden on the exercise of religion.” *Id.* at 2779.

18 The Court then went on to state:

19 The Religious Freedom Restoration Act of 1993 (RFRA) prohibits
20 the “Government [from] substantially burden[ing] a person's
21 exercise of religion even if the burden results from a rule of general
22 applicability” unless the Government “demonstrates that
23 application of the burden to the person—(1) is in furtherance of a
24 compelling governmental interest; and (2) is the least restrictive
25 means of furthering that compelling governmental interest.” 42
26 U.S.C. §§ 2000bb–1(a), (b). As amended by the Religious Land
27 Use and Institutionalized Persons Act of 2000 (RLUIPA), RFRA
28 covers “any exercise of religion, whether or not compelled by, or
central to, a system of religious belief.” § 2000cc–5(7)(A).

Id. at 2754.

Recently, the Tenth Circuit described the application of the RFRA:

Most religious liberty claimants allege that a generally applicable
law or policy without a religious exception burdens religious
exercise, and they ask courts to strike down the law or policy or
excuse them from compliance. Our circuit's three most recent
RFRA cases fall into this category. In *Hobby Lobby Stores, Inc. v.*
Sebelius, 723 F.3d 1114 (10th Cir.2013) (en banc), *aff'd sub nom.*
Hobby Lobby, — U.S. —, 134 S.Ct. 2751, 189 L.Ed.2d 675, the

⁵³ The description of Mardell, Inc., a subsidiary, has a more direct religious function because, apparently, Mardell operates “Christian and Educational Supply Stores in numerous states. JX 2J p. 6.

1 ACA required the plaintiffs to provide their employees with health
2 insurance coverage of contraceptives against their religious beliefs.
3 In *Yellowbear v. Lampert*, 741 F.3d 48 (10th Cir.2014), a prison
4 policy denied the plaintiff access to a sweat lodge, where he wished
5 to exercise his Native American religion. In *Abdulhaseeb v.*
6 *Calbone*, 600 F.3d 1301 (10th Cir.2010), a prison policy denied the
7 plaintiff a halal diet, which is necessary to his Muslim religious
8 exercise. In each instance, the law or policy failed to provide an
9 exemption or accommodation to the plaintiff(s).

10 The Supreme Court's recent ruling in *Holt v. Hobbs*, 135 S.Ct. 853,
11 2015 WL 232143 (2015), which concerned a prison ban on inmates'
12 growing beards, is another recent example of the more common
13 RFRA claim. The plaintiff in *Holt* sought to grow a beard in
14 accordance with his Muslim faith. In *Holt*, like in *Hobby Lobby*, the
15 government defendants insisted on a complete restriction and did
16 not attempt to accommodate the plaintiff's religious exercise. The
17 plaintiff in *Holt* proposed a compromise—he would be allowed to
18 grow only a half-inch beard—which the prison refused. 135 S.Ct. at
19 861. The Court ultimately approved this compromise in its ruling.
20 *Id.* at 867.

21 *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, No. 13-1540, 2015 WL
22 4232096, at *14 (10th Cir. July 14, 2015)

23 That Court when on to explain in some detail the RFRA application:

24 RFRA was enacted in 1993 in response to *Employment Division,*
25 *Department of Human Resources of Oregon v. Smith*, 494 U.S. 872,
26 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), in which the Supreme
27 Court held that burdens on religious exercise are constitutional
28 under the Free Exercise Clause if they result from a neutral law of
general application and have a rational basis. *Id.* at 878–80; *United*
States v. Hardman, 297 F.3d 1116, 1126 (10th Cir.2002). Congress
enacted RFRA to restore the pre-*Smith* standard, which permitted
legal burdens on an individual's religious exercise only if the
government could show a compelling need to apply the law to that
person and that the law did so in the least restrictive way. *Smith*,
494 U.S. at 882–84; *see also Hobby Lobby*, 134 S.Ct. at 2792–93
(Ginsburg, J., dissenting). Congress specified the purpose of RFRA
was to restore this compelling interest test as it had been recognized
in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965
(1963), and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32
L.Ed.2d 15 (1972). *See* 42 U.S.C. § 2000bb(b)(1).

By restoring the pre-*Smith* compelling interest standard, Congress
did not express any intent to alter other aspects of Free Exercise
jurisprudence. *See id.*; *Hobby Lobby*, 723 F.3d at 1133 (“Congress,
through RFRA, intended to bring Free Exercise jurisprudence back
to the test established before *Smith*. There is no indication Congress
meant to alter any other aspect of pre-*Smith* jurisprudence....”).
Notably, pre-*Smith* jurisprudence allowed the government “wide
latitude” to administer large administrative programs, and rejected

1 the imposition of strict scrutiny in that context. As the Supreme
2 Court indicated in *Bowen v. Roy*,

3 In the enforcement of a facially neutral and uniformly applicable
4 requirement for the administration of welfare programs reaching
5 many millions of people, the Government is entitled to wide
6 latitude. The Government should not be put to the strict test applied
7 by the District Court; that standard required the Government to
8 justify enforcement of the use of Social Security number
9 requirement as the least restrictive means of accomplishing a
10 compelling state interest.

11 476 U.S. 693, 707, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986). As we
12 discuss at greater length below, the pre-*Smith* standards restored by
13 RFRA permitted the Government to impose *de minimis*
14 administrative burdens on religious actors without running afoul of
15 religious liberty guarantees.

16 3. Elements of RFRA Analysis

17 RFRA analysis follows a burden-shifting framework. “[A] plaintiff
18 establishes a prima facie claim under RFRA by proving the
19 following three elements: (1) a substantial burden imposed by the
20 federal government on a(2) sincere (3) exercise of religion.”
21 *Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir.2001); see 42
22 U.S.C. § 2000bb–1(a). The burden then shifts to the government to
23 demonstrate its law or policy advances “a compelling interest
24 implemented through the least restrictive means available.” *Hobby*
25 *Lobby*, 723 F.3d at 1142–43. The government must show that the
26 “compelling interest test is satisfied through application of the
27 challenged law ‘to the person’—the particular claimant whose
28 sincere exercise of religion is being substantially burdened.” *Id.* at
1126 (quotations and citation omitted). “This burden-shifting
approach applies even at the preliminary injunction stage.” *Id.*

We have previously stated “a government act imposes a
‘substantial burden’ on religious exercise if it: (1) requires
participation in an activity prohibited by a sincerely held religious
belief, (2) prevents participation in conduct motivated by a
sincerely held religious belief, or (3) places substantial pressure on
an adherent to engage in conduct contrary to a sincerely held
religious belief.” *Hobby Lobby*, 723 F.3d at 1125–26 (quotations
and alterations omitted); see also *Yellowbear*, 741 F.3d at 55
(applying this framework to RLUIPA); *Abdulhaseeb*, 600 F.3d at
1315 (same). As we discuss in the next section, whether a law
substantially burdens religious exercise in one or more of these
ways is a matter for courts—not plaintiffs—to decide.

4. Courts Determine Substantial Burden

To determine whether plaintiffs have made a prima facie RFRA
claim, courts do not question “whether the petitioner ... correctly
perceived the commands of [his or her] faith.” *Thomas v. Review*
Bd. of Ind. Emp’t Sec. Div., 450 U.S. 707, 716, 101 S.Ct. 1425, 67

1 L.Ed.2d 624 (1981); *see Hobby Lobby*, 723 F.3d at 1138–40. But
2 courts do determine whether a challenged law or policy
3 substantially burdens plaintiffs' religious exercise. RFRA's statutory
4 text and religious liberty case law demonstrate that courts—not
5 plaintiffs—must determine if a law or policy substantially burdens
6 religious exercise.

7 RFRA states the federal government “shall not substantially burden
8 a person's exercise of religion.” 42 U.S.C. § 2000bb–1(a). We must
9 “give effect ... to every clause and word” of a statute when possible.
10 *United States v. Menasche*, 348 U.S. 528, 538–39, 75 S.Ct. 513, 99
11 L.Ed. 615 (1955). Drafts of RFRA prohibited the government from
12 placing a “burden” on religious exercise. Congress added the word
13 “substantially” before passage to clarify that only some burdens
14 would violate the act. 139 Cong. Rec. S14352 (daily ed. Oct. 26,
15 1993) (statements of Sen. Kennedy and Sen. Hatch).

16 We therefore consider not only whether a law or policy burdens
17 religious exercise, but whether that burden is substantial. If
18 plaintiffs could assert and establish that a burden is “substantial”
19 without any possibility of judicial scrutiny, the word “substantial”
20 would become wholly devoid of independent meaning. *See*
21 *Menasche*, 348 U.S. at 538–39. Furthermore, accepting any burden
22 alleged by Plaintiffs as “substantial” would improperly conflate the
23 determination that a religious belief is sincerely held with the
24 determination that a law or policy substantially burdens religious
25 exercise.

26 *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, *supra*, at *17–18.(fn
27 omitted)

28 To the extent that the FAA enforces a prohibition against collective activity, it not only
burdens but prohibits such collective activity, which is a core religious activity. Here, there is
clear tension: the right to help the fellow worker protected by the NLRA and the Norris
LaGuardia Act against the limitation imposed by the application of the FAA. The RFRA teaches
that the FAA must give way to the religious right to help fellow workers.

Nor is there any governmental interest. The NLRA and Norris-LaGuardia Act defeat the
argument that there is any governmental interest in forbidding or burdening group action. They
serve to protect such activity.

1 Finally the application of the FAA cannot meet the final test; by disallowing all group
2 actions, it does not reflect a “least restrictive” means of accomplishing any compelling
3 governmental interest in preserving and protecting arbitration in general.

4 The least-restrictive-means standard is exceptionally demanding,
5 see *City of Boerne*, 521 U.S., at 532, 117 S.Ct. 2157, and it is not
6 satisfied here. HHS has not shown that it lacks other means of
7 achieving its desired goal without imposing a substantial burden on
8 the exercise of religion by the objecting parties in these cases. See
§§ 2000bb–1(a), (b) (requiring the Government to “demonstrat[e]
that application of [a substantial] burden to the person ... is the least
restrictive means of furthering [a] compelling governmental
interest” (emphasis added)).

9 *Burwell v. Hobby Lobby Stores, Inc.*, *supra* at, 2780,

10 The FAA could easily be applied to contracts in all its aspects with this one exception of
11 application to concerted claims in arbitration by employees governed by the NLRA. Carving out
12 this exception, which is limited, would be the “least restrictive” means of achieving the goals of
13 the FAA without interfering with the religious rights of employees.⁵⁴ Thus, the FAA would
14 apply in the *AT&T v. Concepcion*, 563 U.S. 321 (2011) context because no employee religious
15 rights were at issue. This would not affect any other policies that animate the FAA doctrines.

16 Hobby Lobby, in its Handbook, as we pointed out, believes that the workplace is one
17 where employees, including workers, must operate the business and act in the manner consistent
18 with their religion:

19 In order to effectively serve our owners, employees and customers,
20 the Company is committed to:

- 21 • Honoring the Lord and all we do by operating the Company
in a manner with biblical principles;
- 22 • Serving our employees and their families by establishing a
23 work environment and Company policies which build
character, strength in individuals, and nurture families; and
- 24 • Providing a return on the owner’s investment, sharing the
25 Lord’s blessings with employees, and investing in our
community.

26
27 ⁵⁴ The FAA already carves out maritime transactions and contracts of employment for employees
28 involved in transportation.

1 We believe that it is by God's grace and provision that the
2 Company has endured. He has been faithful in the past, and we
trust Him for our future.

3 JX 2I p. 6 and JX 2J p. 6.

4 The question then is whether, when workers get together to benefit themselves in the
5 workplace, is this a religious exercise? That question is easily answered in the affirmative.

6 Religions are replete with references to the workplace. The religious exercise to help their
7 fellow worker is a fundamental tenet of every religion. Whether we use the phrase "brotherly
8 love" or otherwise, every religion encourages workers to help each other to make themselves and
9 the workplace better.⁵⁵ We have attached summaries from various religions that emphasize the
10 core principle that helping fellow workers is a central religious act. See Attachment A. The
11 central religious act of helping other workers is a core principle of Christianity, which seems to
12 govern the principles by which Hobby Lobby operates.

13 Hobby Lobby brought its lawsuit to challenge a portion of the Affordable Care Act
14 because it claimed that statute burdened its religious exercise. The Court found, against the
15 government's arguments, that the Affordable Care imposed a substantial burden on religious
16 activity and found that the government could not establish that it imposed the least restrictive
17 means of establishing any governmental interest.

18 Here, we have three federal laws at issue:

- 19 • The National Labor Relations Act, 29 U.S.C. § 151, *et seq.*;
- 20 • The Norris-LaGuardia Act, 29 U.S.C. § 11, *et seq.*; and
- 21 • The Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*

22 The RFRA applies to supersede any governmental restriction on the free exercise of such
23 religious activity. To the extent that those laws are interpreted in any way to burden the religious
24

25 ⁵⁵ This is just a religious version of the solidarity principle explained by the Board in *Fresh and*
26 *Easy, supra*. This is the application of the most fundamental religious principle: the Golden
27 Rule. See https://en.wikipedia.org/wiki/Golden_Rule. If some fellow employees ask for help
28 regarding a workplace issue, the other employee should help the first. Hobby Lobby directly
contradicts the Golden Rule.

1 exercise of helping fellow workers, the Religious Freedom Restoration Act requires that super
2 strict scrutiny be applied.

3 Here, the National Labor Relations Act governs the right of employees to engage in
4 concerted activities. It is nothing more than workers getting together to help themselves and their
5 families. Thus, there is nothing inconsistent with the application of Section 7, but any limitation
6 on the application of Section 7 would be contrary to the religious views of those who want to help
7 fellow workers.

8 The Norris-LaGuardia Act is to the same effect.

9 Here, Hobby Lobby will argue that the Federal Arbitration Act forecloses the application
10 of the National Labor Relations Act and the Norris-LaGuardia Act. The problem, however, with
11 Hobby Lobby's argument is that the Religious Freedom Restoration Act must be interpreted and
12 applied in a way that protects the religious right of employees to engage in concerted activity. In
13 this case, the concerted activity would be to present group claims in order to benefit workers as a
14 group. This is nothing more than concerted activity.⁵⁶

15 Hobby Lobby uses as an alternative arbitration process the Christian Conciliation's rule
16 of Procedure for Christian Conciliation. Nothing in its rules prohibits group or collective or class
17 resolution of disputes. Hobby Lobby's prohibition in its FUAP is thus contrary to the very
18 religious organizations procedures which it adopts. It is also doubtful that in light of the RFRA,
19 the Board can invalidate the Christian Conciliation's religious form of arbitration. And this is
20 particularly true since there is a deep tradition of religious arbitration.⁵⁷ The fact that the very
21 religious based procedure that Hobby Lobby uses, allows group complaints undermines the
22 application of the FAA to prohibit such collective disputes from being resolved.

23 There is no doubt that the Federal Arbitration Act, if applied to foreclose concerted
24 activity, would substantially burden the exercise of religion by those employees who wanted to

25 ⁵⁶ These principles would not apply to most of the situations addressed by *AT&T v. Concepcion*,
26 563 U.S. 321 (2011), which involved commercial disputes.

27 ⁵⁷ See, Michael A. Helfand, *Arbitration's Counter-Narrative: The Religious Arbitration*
28 *Paradigm*, 124 Yale L.J. 2994, 3014 (2015)(The paradigmatic example of this counter-
narrative is religious arbitration).

1 work together to help their brothers and sisters in the workplace. It would also burden those
2 employees of other employers.

3 The burden shifts at that point under the RFRA for the government to establish that that
4 substantial burden “is in the furtherance of compelling government interest.” Here, there is no
5 governmental interest.⁵⁸ The government can simply allow, consistent with the government
6 interest of the National Labor Relations Act and the Norris-LaGuardia Act, employees to present
7 their claims concertedly in some forum. Nothing in this case requires that that forum be
8 arbitration. That forum can be arbitration or in court. This is the central thrust of *Murphy Oil*.
9 What an employer cannot do, consistent with the National Labor Relations Act, the Norris-
10 LaGuardia Act and the Religious Freedom Restoration Act, is entirely foreclose workers working
11 together to make their workplace a better circumstance.

12 For these reasons, the Religious Freedom Restoration Act applies to this case.⁵⁹ The
13 Federal Arbitration Act cannot be applied to interfere with the religious right of employees to
14 help other employees by prohibiting employees from jointly working together to improve the
15 workplace and to help fellow workers with respect to wages, hours and working conditions.⁶⁰

16 **XXIII. THE REMEDY**

17 The ALJ’s recommended remedy is inadequate.

18
19 ⁵⁸ The Administrative Law Judge foreclosed such an inquiry. Second, it is clear that this is not
“the least restrictive means of further compelling the governmental interest.”

20 ⁵⁹ The religious exemption principles which we derive from the RFRA are already in place and
21 have been long recognized for those who have some religious objection to joining a supporting
union. See 29 U.S.C. § 159. There are some religions which have the basic tenet that
22 adherents should not join or support unions. Title 7 also recognizes that an accommodation is
sometimes necessary. See *EEOC v. Univ. of Detroit*, 904 F.2d 331 (6th Cir. 1990) (because
23 employee’s religious objection was to union itself, reasonable accommodation was required
allowing him to make charitable donation equivalent to amount of union dues, instead of
24 paying dues). Religious principles often govern and require an accommodation. *EEOC v.*
Abercrombie & Fitch Stores Inc., 135 S.Ct. 2028, 2015 WL 2464053 (2015). This case
25 represents this principle: there are those who believe that it is a basic religious tenet to help
fellow workers. Title VII thus requires an accommodation, workers who believe it is a
26 religious exercise to help their fellow workers must be accommodated.

27 ⁶⁰ The Board must address the application of the RFRA because it contains a statutory fee
28 requirement. Charging Party is entitled to its fees if it prevails on this ground.

1 The employer should be required to post permanently the Board's ill-fated employee
2 rights notice. The Courts that invalidated the rule noted that such a notice could be part of a
3 remedy. It is time for the Board to impose the requirement for a lengthy posting of that notice as
4 a remedy for unfair labor practices.

5 Additionally, any notice that is posted should be posted for the period of time from when
6 the violation began until the notice is posted. The short period of 60 days only encourages
7 employers to delay proceedings, because the notice posting will be so short and so far in the
8 future.

9 The Board's notice and the Decision of the Board should be mailed to all employees.
10 Simply posting the notice without further explanation of what occurred in the proceedings is not
11 adequate notice for employees. The Board Decision should be mailed to former employees and
12 provided to current employees.

13 An appropriate explanation by way of notice reading should be required. That notice
14 reading should require that a Board agent read the notice and allow employees to inquire as to the
15 scope of the remedy and the effect of the remedy. Simply reading a notice without explanation is
16 inadequate. The employer should not be present.

17 The employer should not be allowed to implement a new FUAP. The Board does not
18 possess that power. A new FUAP can only occur after there has been a complete remedy of the
19 violations found in this case. In other words, the Employer may not implement any new policy
20 until after it has completely remedied this case by rescinding all the unlawful policies, posting an
21 appropriate notice allowing employees to take appropriate legal action without the
22 implementation of any purported forced arbitration waiver.

23 The traditional notice is also inadequate. The standard Board notice should contain an
24 affirmative statement of the unlawful conduct. We suggest the following:

25 We have been found to have violated the National Labor Relations
26 Act. We illegally maintained a Mutual Arbitration Procedure. We
27 have rescinded that unlawful policy. Additionally, we have been
28 found to have implemented a policy that violated federal law. We
have agreed to rescind that policy.

1 Absent some affirmative statement of the unlawful conduct, the employees will not
2 understand the arcane language of the notice. Nor is the notice sufficient without such an
3 admission. In effect, the way the notice is framed is the equivalent of a statement that Hobby
4 Lobby will not do specified conduct, not an admission or recognition that it did anything wrong to
5 begin with.

6 The notice should be mailed to employees. The Board's decision should also be mailed at
7 the same time. The notice does not explain what occurred, and only through a receipt of the
8 Board's decision can the employees know what occurred.

9 The Notice should require that the person signing the notice have his or her name on the
10 notice. This avoids the common practice where someone scrawls a name to avoid being
11 identified with the notice, and the employees have no idea who signed it.

12 The employees should be allowed work time to read the Board's Decision and Notice.

13 Hobby Lobby should be required to toll the statute of limitations for any claims for the
14 period during which the FUAP has been in place until a reasonable time after employees received
15 the notice so that they may assert any collective or group claims that they have. Otherwise, the
16 Employer would have had the advantage of forestalling and foreclosing group claims. This
17 would give employees an opportunity to learn that the FUAP has been rescinded and that they
18 may bring group or collective claims.

19 The Notice should be read to employees by a Board agent outside the presence of
20 management. Representatives of the Charging Party should be present. Employees should be
21 allowed to ask questions.

22 **XXIV. CONCLUSION**

23 Hobby Lobby preaches concerted activity in the workplace. This is the central right
24 protected by the NLRA, the Norris-LaGuardia Act and the RFRA. The FUAP is unlawful under
25 the Act. The FAA cannot constitutionally be applied to the activity involved in this case. The
26 FUAP is unlawful.

27
28

1 Dated: December 4, 2015

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

2
3
4
5 137247\830073
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

By: /S/ DAVID A. ROSENFELD
DAVID A. ROSENFELD
Attorneys for Charging Party
THE COMMITTEE TO PRESERVE THE
RELIGIOUS RIGHT TO ORGANIZE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**PROOF OF SERVICE
(CCP §1013)**

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On December 4, 2015 I served the following documents in the manner described below:

**BRIEF IN SUPPORT OF CHARGING PARTY'S CROSS-EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE AND ANSWER BRIEF TO THE
EXCEPTIONS OF THE RESPONDENT**

☒ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through the Weinberg, Roger & Rosenfeld's electronic mail system to the email addresses set forth below.

On the following part(ies) in this action:

Mr. Frank Birchfield
Ogletree Deakins
1745 Broadway, 22nd Floor,
New York, NY, 10019
Email: frank.birchfield@ogletreedeakins.com

Ms. Yasmin Macariola
National Labor Relations Board, Region 20
Field Attorney
901 Market Street, Suite 400
San Francisco, CA 94103-1738
Email: Yasmin.macariola@nlrb.gov

Christopher C. Murray
Ogletree Deakins
111 Monument Circle, Suite 4600
Indianapolis, IN 46204
Email:
Christopher.murray@ogletreedeakins.com

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on December 4, 2015, at Alameda, California.

/s/Katrina Shaw
Katrina Shaw